(1) Supreme Court, U.S.
FILED

No. 991691 APR 17 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHRIS BOULAHANIS, *et al.*,

Petitioners,

v.

BOARD OF REGENTS, a body politic and corporate, ILLINOIS STATE UNIVERSITY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LOUIS GOLDSTEIN
GOLDSTEIN & FLUXGOLD
33 North Dearborn St.
Suite 1015
Chicago, IL 60602
(312) 726-7772

DONALD W. ANDERSON
DANIELS, MAURO & PINSEL
19 North County St.
Waukegan, IL 60085
(847) 623-5900

MICHAEL E. ROSMAN
Counsel of Record
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW
Suite 300
Washington, DC 20036
(202) 833-8400

147 PP

QUESTIONS PRESENTED

1. Does Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, preclude claims of sex discrimination under the Equal Protection Clause and 42 U.S.C. § 1983?

2. Petitioners alleged that defendants eliminated men's athletic teams because of the sex of the participants. Did those allegations state a claim that defendants violated the equal protection principles of the Constitution?

PARTIES TO THE PROCEEDING

Petitioners are Chris Boulahanis, Edward C. Van Duyne, Jamie R. Burton, Justin Stone, Bryan S. Simkins, Gregory J. Hall, Kevin Bracken, Gerald De Lira, Jr., Jeffrey L. Caston, Jr., Michael F. Brux, Michael B. Lucier, Roger Pascual, Mark Hibner, Kerrie Ann Bracken, Shannon J. Duffy, Patrick R. Manning, and Matt Webster. They were plaintiffs in the District Court and appellants in the Court of Appeals.

Respondents are Board Of Regents, a body politic and corporate, Illinois State University, Thomas Wallace, Rick Greenspan, Linda Herman, Donna Taylor, David Strand, Loren Brown, Jim Grimm, Jim Johnson, Priscilla Matthews, Jean Memken, Ken Newgren, Beth Berner, Albert Otto, Deb Amdor, Rollie Mercer, Jill Hutchison, Bridgett Bartowiak, Jack Niemi, Melanie Ward, Don Spaniak, Jesus Vasquez, Tracy Djerf, Linda Bordner, Joseph Ebbesen, Carl Kasten, Nancy Masterson, Patricia McKenzie, James Myles, Barbara Scheibling, Nirangan Shah, Myron Siegel, William Sulaski, Gretchen Winter, Willie Fowler, Miles McGrew, Amy Mersinger, Bill Tolone, Mike Reetner, and Does 1 through 20 inclusive. They were defendants in the District Court and appellees in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. STATUTORY BACKGROUND 2

B. FACTUAL BACKGROUND 4

C. PROCEEDINGS BELOW 8

REASONS FOR GRANTING THE WRIT 12

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF CIVIL RIGHTS LAW 13

II. BY RESOLVING THE FOREGOING CIRCUIT SPLIT, THIS COURT CAN REMOVE AMBIGUITIES IN THE DOCTRINE OF IMPLIED REPEAL AND ITS APPLICATION TO CIVIL RIGHTS LAWS 17

III. THE LOWER COURT'S HOLDING HAS SERIOUS CONSEQUENCES FOR OTHER CASES 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) . . 21

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 19

Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994) 20

Bedard v. Roger Williams University, 989 F. Supp. 94 (D.R.I. 1997) 21

Bruneau ex rel. Schofield v. South Kortright Cent. School Dist., 163 F.3d 749 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2020 (1999) 12, 14, 17

Canty v. Old Rochester Regional School Dist., 54 F. Supp. 2d 66 (D. Mass. 1999) 14, 18, 22

Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997) . . 15

Doe v. School Administrative District No. 19, 66 F. Supp. 2d 57 (D. Me. 1999) 14

Felker v. Turpin, 518 U.S. 651 (1996) 18

Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998) 13, 22, 23

Huckabay v. Moore, 137 F.3d 871 (5th Cir. 1998) . . 20

Hughes v. Bedsole, 48 F.3d 1376 (4th Cir. 1995) . . . 20

Johnson v. Transportation Agency of Santa Clara, 480 U.S. 616 (1987) 24

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 19

Kelley v. Bd. of Trustees, 35 F.3d 265 (7th Cir. 1994) 11, 24

Kinman v. Omaha Public School Dist., 171 F.3d 607 (8th Cir. 1999) 23

Lakoski v. James, 66 F.3d 751 (5th Cir. 1995) 21

Lillard v. Shelby County Bd. Of Educ., 76 F.3d 716 (6th Cir. 1996) 15, 17

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 21

Maine v. Thiboutot, 448 U.S. 1 (1980) 14

Marbury v. Madison, 5 U.S. 137 (1803) 25

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) . . . . . 9, *passim.*

Miller v. Johnson, 515 U.S. 900 (1995) 25

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 21, 22, 24

Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990) 16

Posadas v. National City Bank, 296 U.S. 497 (1936) 18

Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) 16

Preston v. Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994) 21

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 18

Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994) 18

Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) . 15, 17

Smith v. Robinson, 468 U.S 992 (1984) . . . . 15, *passim.*

Soper ex rel. Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999) 23

Waid v. Merrill Area Public Schools, 91 F.3d 857 (7th Cir. 1996) . . . . . 9, *passim.*

Constitutional Provisions, Statutes, Rules

20 U.S.C. § 1681 . . . . . i, *passim.*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 8-9

28 U.S.C. § 1343 8-9

34 CFR 106.41 2

34 CFR 106.41(c) 2

34 CFR 106.41(c)(1) 3

42 U.S.C. § 2000d, *et seq.* 12, 13, 23

42 U.S.C. § 2000e, *et seq.* 20

42 U.S.C. § 1981(c) 21

42 U.S.C. § 1983 . . . . . i, *passim.*

42 U.S.C. § 2000a-1 21

44 Fed. Reg. 71413 (1979) 4

Education Amendments of 1974, Pub. L. No. 93-380 2

U.S. Const. amend. XIV, § 1 . . . . . i, *passim.*

Other Authorities

Department of Health, Education, and Welfare, *Elimination of Sex Discrimination in Athletic Programs* (1975) 3

Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465 (1998) 14

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (App. 3a-20a) is reported at 198 F.3d 633. The decision of the District Court (App. 40a-75a) dismissing the constitutional claims at issue here is unreported. That decision adopted in part the report and recommendation of a magistrate judge (App. 76a-110a), which is also unreported. The subsequent decision of the District Court dismissing the remaining claims (App. 24a-39a) is reported at 35 F. Supp. 2d 1118.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1999. The Court of Appeals denied a motion for rehearing and suggestion for rehearing *en banc* in an order dated and entered on January 19, 2000. App. 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . "

2. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall

"deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case presents the question of whether the passage of major civil rights legislation prohibiting sex discrimination essentially repealed the pre-existing right of the victims of such discrimination to seek redress under the Constitution. The circuit courts have split on this question, with three courts of appeals holding that it does, and three holding that it does not.

A. STATUTORY BACKGROUND

Congress enacted Title IX in 1972. In Section 844 of the Education Amendments of 1974, Congress authorized the Department of Health, Education and Welfare ("HEW") to adopt regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. Law 93-380, 88 Stat. 484, 612.

Public Law 93-380 resulted in regulations that today appear at 34 CFR 106.41, and are currently enforced by the Office of Civil Rights ("OCR") of the Department of Education. Those regulations require educational institutions that are recipients of federal funds to provide "equal athletic opportunity" in interscholastic, intercollegiate, club or intramural athletics "for members of both sexes." 34 CFR 106.41(c). The regulations identify ten (10) factors that OCR will consider in determining whether recipients are providing "equal athletic opportunity." 34 CFR 106.41(c). The first of those ten factors -- and the only one that implicates whether teams

exist in the first place, as opposed to the funds and support that each team receives -- requires that the recipient "effectively accommodate the interests and abilities of members of both sexes." 34 CFR 106.41(c)(1).

From the outset, the agencies (HEW and OCR) enforcing the statute have made it clear that "effective accommodation" mandates (or, at least, permits) the use of "set asides." If a university or college chooses to have one set of intercollegiate or intramural sports teams for both sexes (in, for example, tennis, golf, and soccer), allowing those teams to select their players by competitive ability was and is *forbidden* under the agency interpretation unless that competitive selection process "effectively accommodates" the interests of both sexes. Department of Health, Education, and Welfare, *Elimination of Sex Discrimination in Athletic Programs*, 5-6 (1975) (available at http://www.ed.gov/offices/OCR/holmes.html). That is, the fund recipient would have to insure that the "competition" for positions on these unisex teams reserved a minimum number of spaces for each sex.

The regulations also permit recipients of federal funds to have separate sex-segregated sports teams. 34 CFR 106.41(b). Where a school chooses to opt for such separate teams, the "effective accommodation" of the "interests and abilities of members of both sexes" can be effected, according to longstanding agency interpretation, in one of three ways.

First, the school can set aside a sufficient number of "athletic opportunities" so that the proportion of varsity "participation opportunities" for each sex is the same as the proportion of the undergraduate population for that sex. (A "participation opportunity" is, in essence, a spot

on a team. Thus, under this version of "effective accommodation," the percentage of athletic spots going to women and men should equal their respective percentages in the undergraduate population.) 1979 Policy Interpretation, 44 Fed. Reg. 71413, 71418 (December 11, 1979). That is, just as a school must set aside a certain number of spaces on a unisex sports team to "effectively accommodate" each sex, so a school might "effectively accommodate" separate-sex sports teams by setting aside a certain percentage of the total athletic "spots" it provides. For all practical purposes, this results in a certain amount of money and support being set aside for teams of each sex *regardless of the varying interests and abilities of each sex at the particular institution.*

The second and third ways in which a fund recipient can "effectively accommodate" are (1) to provide a "history and continuing practice of program expansion" for the sex whose "participation opportunities" is below its proportion in the undergraduate population and (2) to "fully and effectively accommodate" the interests and abilities of that sex. *Id.*

Conspicuously, the regulations do not require the *equal* accommodation of both sexes' interests and abilities. (Indeed, that point is fairly obvious by considering the last method that fund recipients can "effectively accommodate the interests and abilities of members of both sexes": *fully* accommodating the interests and abilities of one sex, *i.e.*, funding *all* requested and qualified sports teams for that sex, but not the other sex.)

B. FACTUAL BACKGROUND

In the spring of 1995, Illinois State University

("ISU") eliminated its men's intercollegiate soccer and wrestling teams, and added a women's soccer team. It did this so that a particular percentage of total athletic "spots" (or "participation opportunities") offered by ISU would go to women.

ISU is a public university in the State of Illinois operated by the state. The individual defendants are various officers, members of various committees, and members of the Board of Regents who participated in the decision to eliminate the men's sports. Petitioners, plaintiffs in the District Court, are various members of the men's wrestling and soccer teams, representing a class of present and potential future members of those teams as certified by the District Court pursuant to Rule 23(b)(2). The individual plaintiffs missed years of athletic competition, missed professional opportunities that additional years of intercollegiate competition would have provided, and/or were obligated to attend other institutions at additional cost.

The process by which ISU eliminated the men's teams began in 1993, when a University-sponsored Gender Equity Review Committee issued a report in the fall of that year. The committee noted that, in the year 1992-93, women comprised 34% of the school's intercollegiate athletes whereas they made up 55% of the undergraduate population. The committee concluded that those percentages did "not reflect equitable participation opportunities," and recommended the development of plans so that the proportions "reflect fair and reasonable participation opportunities." (Second Am. Compl. Ex. A, p. 13). The committee report was distributed, *inter alia*, to ISU's Athletic Department, an ISU advisory committee known as the Athletic Council, and the President of ISU.

Over the ensuing months, ISU considered ways to comply with its understanding of Title IX and to meet the objectives of the committee report. In addition, ISU wanted to comply with the requirements of the National College Athletic Association ("NCAA"). The Gender Equity Task Force of the NCAA had issued a guideline stating that "the ultimate goal for each [NCAA member] institution should be that the numbers of male and female athletes are substantially proportionate to their numbers in the institutions' undergraduate student populations." Plaintiffs' Response To Defendants' Statement of Undisputed Facts ¶ 21.[1]

In early 1995, ISU distributed a survey to its undergraduate students to determine their interests in athletics. The results of that survey suggested that ISU had provided opportunities for those females interested in competing in intercollegiate athletics to a *greater* degree than it did for males so interested. Whereas 6.5% of the males responding to the survey were interested in intercollegiate varsity-level competition not then offered by ISU, only 2.7% of the females responding to the survey were similarly interested in non-ISU sports. (This was a statistically significant difference.) The authors of the survey noted that this result "suggests that females are *more*

---

[1] In January 1995, an NCAA review team conducted an audit of ISU's athletics and concluded that they were not in conformity on "gender equity." Curiously, though, the reason why the review team found a lack of conformity had nothing to do with the proportion of athletic spots reserved for women, but rather because ISU purportedly had not put a written gender equity plan in place two years after the completion of the Gender Equity Report. Plaintiffs' Response to Defendants' Statement of Undisputed Facts, ¶ 20. This, of course, was obviously untrue because the report had been completed only in the fall of 1993. *Id.* ¶ 10.

satisfied with the varsity-level opportunities at [ISU]." Survey of Athletic Interests and Abilities (part of Pls' SJ Opp. Exhibit I), p. 12 (emphasis added). Defendants did not submit any contrary evidence, *i.e.*, evidence that women's unmet interest in intercollegiate athletics was greater than that of men or that they were less satisfied, on the whole, with the opportunities ISU provided.

Similarly, a significantly higher percentage of men (64.3%) than women (41.5%) expressed an interest in participating in any level of athletic competition (varsity, club, or intramural). Of those who were not interested, a significantly higher percentage of women than men attributed that lack of interest to the fact that they did not enjoy athletics. A significantly higher percentage of men than women attributed their lack of interest to the quality of the programs, facilities, and coaches provided by ISU.

The interests in athletics at ISU is consistent with the interests of the pool from which ISU selects its student body. In 1992-93, approximately 36.5% of all participants in high school sports were women. In Illinois, the state from which most of ISU's student body came, 66% of the participants in interscholastic athletics were male and 34% were female. Defendants' Response To Plaintiffs' Statement of Undisputed Facts ¶ 39.

In February 1995, the Department of Intercollegiate Athletics presented its multi-year gender equity management plan (the "Plan") to ISU's President and Legal Counsel. A final draft of the Plan was prepared in March 1995, and made reference to the results of the survey described above. The Plan noted that the proportion of athletic "spots" at ISU for women had been increasing throughout the early 1990's (31% in fiscal year ("FY")

1992, 34% in FY 1993, 35% in FY 1994, and 36% in FY 1995). It also noted that the survey results showed that "the overwhelming majority of female respondents are satisfied with the athletic opportunities at the University." Plan, p. 6.

Nonetheless, and despite the fact that the survey supported the proposition that men's interests and abilities were already being accommodated *less* than women's, the Plan recommended the elimination of men's soccer and wrestling, and the addition of women's soccer.

The advisory Athletic Council met on March 22, 1995 and April 26, 1995 to consider this recommendation. The only method of achieving "gender equity" considered by the Athletic Council during these meetings was reserving a "proportional" number of athletic "spots" for women. Defendants' Response To Plaintiffs' Statement of Undisputed Facts ¶ 56.

The President of ISU then adopted the recommendation, and the two men's teams were eliminated.

C. PROCEEDINGS BELOW

Petitioners filed a complaint in the District Court on September 22, 1995. An amended complaint was filed on November 13, 1995, and, by leave of court, a second amended complaint (the "Complaint") was filed on May 24, 1996. The Complaint alleged various claims for gender discrimination, including one under Title IX (Count I) and a second pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count II). The District Court had jurisdiction over these claims, and the case as a whole, pursuant to 28

U.S.C. §§ 1331 and 1343.

The Complaint also alleged that defendants knew that the men's wrestling and soccer teams had significant proportions of racial minorities, and that the elimination of those teams reduced the proportion of minorities participating in ISU athletics. The Complaint alleged various claims for race discrimination, including one under Title VI (Count IV) and a second pursuant to the Equal Protection Clause (Count V).

On November 14, 1996, the District Court certified a class of all present and prospective students at ISU who were (and would be) eligible and willing to participate in intercollegiate soccer and wrestling and who were (and will be) excluded from participation because of their sex.

After defendants moved to dismiss, the Magistrate Judge assigned to the case made a recommendation and report dated June 12, 1997. App. 76a-110a. He recommended, *inter alia*, the dismissal of the claims alleging sexual and racial discrimination under the Equal Protection Clause (Counts II and V) pursuant to this Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) and the decision of the Seventh Circuit in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996). The Magistrate Judge read *Waid* and its interpretation of *Sea Clammers* to prohibit simultaneous causes of actions pursuant to both the Equal Protection Clause and Title IX. App. 91a-92a. With respect to the claims pursuant to Title IX, the Magistrate Judge held that the OCR policy interpretation was entitled to "substantial deference," and that compliance with the policy interpretation would be sufficient to defeat a claim pursuant to Title IX. App. 92a-95a. The report

recommended that the claim pursuant to Title IX be dismissed with leave to replead. App. 96a.

In a decision and order dated October 6, 1997 (App. 40a-75a), the District Court ruled on the objections each side filed to the recommendation and report, and adopted the report and recommendation in part. The District Court agreed with the Magistrate Judge's interpretation of *Sea Clammers* and *Waid*. The District Court held that Title IX precluded the assertion of both the claim alleging sexual discrimination under the Equal Protection Clause and even the claim alleging racial discrimination under the Equal Protection Clause. App. 53a-54a, 70a. The District Court rejected the report to the extent that it dismissed the Title IX claim. App. 50a.

Defendants moved for summary judgment on the remaining claims in November 1998. In a decision and order filed on February 3, 1999 (App. 24a-39a), the District Court granted that motion in relevant part. With respect to petitioners' Title IX claim, the District Court found that ISU had not violated Title IX despite the fact that the men's wrestling and soccer teams were cut because their participants were male. The District Court relied heavily on OCR's interpretation of Title IX and previous decisions that had upheld OCR's authority to promulgate the same interpretation. App. 28a-31a. It held that evidence that males at ISU had greater interests and abilities in sports was irrelevant, even though that meant that ISU could cut sports teams of the gender whose interests and abilities were *already* being *less* accommodated. App. 32a. An amended final judgment eventually was entered (App. 21a-23a), and petitioners filed a timely notice of appeal.

The Seventh Circuit affirmed. App. 3a-20a. Relying on its previous decision in *Kelley v. Bd. of Trustees*, 35 F.3d 265 (7th Cir. 1994), which had held the OCR Policy Interpretation to be a reasonable interpretation of Title IX, the court held that the elimination of men's teams to achieve "gender proportionality" did not violate Title IX. App. 7a-13a. Relying on *Kelley*, the Court also held that Title IX itself, as so interpreted, did not violate the Equal Protection Clause because the stated objective of Title IX was not ensuring athletic opportunities for women, but prohibiting educational institutions from discriminating on the basis of sex. App. 13a-14a. The Court concluded that eliminating athletic teams based upon the sex of the participants was substantially related to the goal of prohibiting sex discrimination. App. 14a.

The Seventh Circuit also concluded that *Sea Clammers* and *Waid* required dismissal of petitioners' claim that defendants engaged in sex-based discrimination in violation of the Constitution and Section 1983. App. 15a-16a. Petitioners argued that Title IX should not be deemed to preclude constitutional claims against individuals because individuals cannot be sued under Title IX, but the court rejected that argument, and held that it "misconstrue[s] the doctrine of preemption":

> In providing for the remedies available under Title IX, Congress has created a regime for the redress of sex discrimination in athletic opportunities at federally-funded institutions. In order to be comprehensive, that regime need not include possible claims against both the institution and individuals involved. The fact that individual claims are not available under Title IX means that Congress has chosen suits against institutions as the means of

redressing such wrongs. App. 15a-16a.

Finally, the Seventh Circuit held that the District Court had erred in concluding that Title IX "preempted" petitioners' claims for race-based discrimination in violation of the Constitution, but concluded that the error was harmless because Title VI precluded those claims. App. 16a-18a.

Petitioners moved for reconsideration or rehearing *en banc*. The Seventh Circuit denied that motion on January 19, 2000. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

The question of whether Title IX precludes the assertion of constitutional claims has been a source of controversy in the lower courts. Three circuit courts have said that those preexisting causes of action under the Constitution have been subsumed into Title IX; three circuit courts have said just the opposite. *See Bruneau ex rel. Schofield v. South Kortright Cent. School Dist.*, 163 F.3d 749, 757-59 (2d Cir. 1998) (describing the circuit split), *cert. denied*, 119 S. Ct. 2020 (1999). Given the breadth of different constitutional claims that could be subsumed by Title IX, this Court should grant this petition to resolve the circuit split.

Granting the petition would also permit this Court to clarify the interplay of various civil rights laws, and the doctrine of "implied repeal" as it is applied to civil rights laws generally. Such clarification is desperately needed. Many civil rights laws overlap, both with one another and with the Constitution. (That is, they prohibit substantively similar conduct.) A whole host of "preclusion" arguments

have been made, with varying results, in the lower courts. Any number of others could be made.

The consequences of the "preclusion" theory promulgated by the court below are significant. Most notably, given this Court's decision in *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), victims of sex-based discriminatory action by *agents* of state educational institutions, acting under color of state law, frequently will be without *any federal remedy at all*. Since Title IX and Title VI are read *in pari materia*, the same would be true of claims of racial discrimination and harassment made against any employee of any state entity that receives federal funds, including police departments, hospitals, and the like. Indeed, the court below in this case applied its "preclusion" theory to Title VI, holding that Title VI precluded plaintiffs from asserting claims of racial discrimination under the Equal Protection Clause.

Finally, the "preclusion" theory is particularly significant here, where the courts have themselves deferred to agency interpretation of the very statute (Title IX) that they insist precludes them from considering constitutional claims. As a consequence, it is a federal agency, rather than the courts, that effectively determines the scope of constitutional rights.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF CIVIL RIGHTS LAW

The circuit courts have split right down the middle on the application of this Court's opinion in *Sea Clammers* to claims that state educational institutions have violated the Constitution by engaging in sex discrimination. *See*

Canty v. Old Rochester Regional School Dist., 54 F. Supp. 2d 66, 75-76, 77 (D. Mass. 1999) (identifying the circuit split and certifying question pursuant to 28 U.S.C. § 1292(b) for immediate appeal because of "[t]he stark division among the six circuits to consider Title IX preclusion of section 1983 actions"); Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465, 1471 (1998) (chart showing circuit split as of 1998, prior to Second Circuit decision in *South Kortright Central School District*).[2]

In *Sea Clammers*, this Court *sua sponte* considered whether rights claimed under two federal laws -- the Federal Water Pollution Control Act, first enacted in 1948, and the Marine Protection, Research and Sanctuaries Act of 1972 -- could be asserted through 42 U.S.C. § 1983, Section 1 of the Ku Klux Klan Act of 1871. (This Court considered this question *sua sponte* because *Maine v. Thiboutot*, 448 U.S. 1 (1980), which had authorized Section 1983 suits to redress violations by state officials of rights created by federal statutes, had been decided only the previous year.) This Court concluded that those two statutes, passed long after Section 1983 had been passed, had their own comprehensive enforcement mechanisms. These enforcement mechanisms reflected Congress's intent to foreclose the use of Section 1983 to enforce rights under those statutes.

Several lower courts considering the preclusive effect of Title IX on constitutional claims have distin-

---

[2] Although the First Circuit has not yet decided this question, the district courts in the First Circuit have also split on the issue. *See Doe v. School Administrative District No. 19*, 66 F. Supp. 2d 57, 65-66 n.8 (D. Me. 1999) (identifying split).

guished *Sea Clammers* because it did not involve "independently existing constitutional rights." *Lillard v. Shelby County Bd. Of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996). *See also Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) ("*Sea Clammers* in no way restricts a plaintiff's ability to seek redress via § 1983 for the violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action for the violation of statutory rights"); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (setting forth, and agreeing with, the analysis of the Sixth Circuit).

The Sixth Circuit in *Lillard* believed that this Court's opinion in *Smith v. Robinson*, 468 U.S 992 (1984), rather than *Sea Clammers*, set forth the proper standard. In *Smith v. Robinson*, this Court concluded that Congress intended the Education of the Handicapped Act to be the exclusive avenue through which even Equal Protection claims for a publicly-financed special education for the handicapped would be asserted. *Lillard* read *Smith v. Robinson* as requiring both a Congressional intent to preclude the constitutional claim and a constitutional claim "virtually identical" to the statutory claim. It concluded that neither factor supported any sort of preclusion of constitutional claims by Title IX. *Lillard*, 76 F.3d at 723.

The cases refusing to apply *Sea Clammers* in the Title IX context also have concluded that Title IX does not have a comprehensive enforcement scheme. Those courts have emphasized that Title IX has no explicit private cause of action, which led them to the conclusion that Congress did not intend to foreclose a remedy under Section 1983 and the Constitution. *E.g.*, *Lillard*, 76 F.3d at 723.

On the other hand, the Second, Third, and Seventh

Circuits have all applied *Sea Clammers* to Title IX and have concluded that Title IX "subsumes" claims made pursuant to the Constitution. The Third Circuit was the first court to address this issue. *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). The Court quoted *Sea Clammers* for the proposition that a comprehensive enforcement scheme precludes reliance on Section 1983, and noted that *Sea Clammers* has been applied in analogous situations. *Pfeiffer*, 917 F.2d at 789.[3]

In *Waid*, the Seventh Circuit held that Title IX and Section 1983 could not be used simultaneously. *Waid v. Merrill Area Public Schools*, 91 F.3d 857, 862 (7th Cir. 1996) ("Both statutes [Title IX and § 1983] prohibit the same kind of conduct and provide compensatory and punitive damages as remedies for that conduct. *Sea Clammers* holds that this sort of overlap is intolerable"). The Court adopted the Third Circuit's approach of precluding any Section 1983 claim based upon the Constitution against institutions covered by Title IX. *Id.* It concluded that "Congress effectively superseded a cause of action under § 1983 that was based on constitutional principles of equal

---

[3] Recently, the Third Circuit has held that Section 1983 *could* be used to assert a claim for a violation of regulations promulgated under Title VI. The court characterized *Pfeiffer* as invoking the doctrine that constitutional questions should be avoided, and distinguished it because, in the case before the court, "plaintiffs [did] not invoke § 1983 to redress a constitutional claim but instead a claim under federal law." *Powell v. Ridge*, 189 F.3d 387, 403 (3d Cir. 1999). Thus, in contrast to the courts like the Sixth Circuit, which have held that, under *Sea Clammers*, statutes do not subsume independently existing constitutional rights, the Third Circuit has suggested that, under *Sea Clammers*, statutes *only* subsume independently existing constitutional rights.

protection." *Id.* at 863.

Finally, the Second Circuit in *South Kortright Central School Dist.* followed the reasoning of the Third and Seventh Circuits, and rejected the analysis of the Sixth, Eighth, and Tenth Circuits. *South Kortright Central School Dist.*, 163 F.3d at 757-58. The court concluded that there was nothing in *Sea Clammers* "that would support a constitutional rights exception," and asserted that *Smith v. Robinson* held to the contrary. Unlike the Sixth and Tenth Circuits, which had concluded that Title IX "does *not* have a 'comprehensive enforcement scheme'" (*Seamons v. Snow*, 84 F.3d at 1234 (quoting *Lillard*, 76 F.3d at 723) (emphasis added)), the Second Circuit specifically held that Title IX *does* have a "comprehensive remedial scheme" that plaintiffs could not bypass. *South Kortright Central School Dist.*, 163 F.3d at 758. *See also* App. 15a-16a.

The circuit split described here concerns an important issue of statutory interpretation that affects constitutional rights and remedies. It warrants resolution by this Court.

II. BY RESOLVING THE FOREGOING CIRCUIT SPLIT, THIS COURT CAN REMOVE AMBIGUITIES IN THE DOCTRINE OF IMPLIED REPEAL AND ITS APPLICATION TO CIVIL RIGHTS LAWS

Prior to the passage of Title IX in 1972, victims of state-sponsored gender discrimination at federally-funded educational institutions could assert claims pursuant to the Constitution, enforced through 42 U.S.C. § 1983. The court below, and the other courts which have adopted

similar analysis, essentially hold that these preexisting claims were eliminated by the passage of Title IX. *See also Canty*, 54 F. Supp. 2d at 73 (adopting defendants' argument that "Congress, in enacting Title IX, did away with a citizen's right to bring suit under the nation's fundamental civil rights law [42 U.S.C. § 1983]"). These courts have held that Title IX impliedly repealed that portion of Section 1983 which permitted such claims to be made.[4]

As a general rule, implied repeals are disfavored. *E.g.*, *Felker v. Turpin*, 518 U.S. 651, 660 (1996). There are only

> "two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . "

Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) *quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

---

[4] Like the First Circuit, we avoid using the word "preemption" here because that word refers to the relationship between federal law and state law, not the relationship between two federal laws (in this case Section 1983 and Title IX). *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994).

This Court has applied the general presumption against implied repeals to civil rights laws. *E.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436-37 (1968) (1870 repassage of Section 1 of the Civil Rights Act of 1866 did not repeal that statute's reach to private conduct). Indeed, this Court has noted that civil rights laws "have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). *But compare Waid*, 91 F.3d at 862 ("*Sea Clammers* holds that this sort of overlap is intolerable").

The presumption against implied repeals, though, was overcome in *Smith v. Robinson*, 468 U.S. 992 (1984). In that case, this Court concluded that "Congress intended the [Education of the Handicapped Act] to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." *Smith v. Robinson*, 468 U.S. at 1009. This Court focused upon the fact that the EHA established "an elaborate procedural mechanism to protect the rights of handicapped children." *Id.* at 1010-11. Since those procedures involved mechanisms for determining the way to meet each child's individual need at the local level, with ongoing parental involvement, permitting a claim under the Constitution would "run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* at 1012.

Given both the general rule that civil rights laws evince an intent to provide overlapping remedies and the rule of *Smith v. Robinson* that a comprehensive enforcement scheme can reflect an intent to preclude previously-

existing causes of action under the Constitution and 42 U.S.C. § 1983, the lower courts have provided a wide and often conflicting array of analyses to reconcile civil rights laws covering similar conduct. For example, most courts have concluded that Title VII does not preclude claims under Section 1983 that intentionally discriminatory employment practices by state employers violate the Equal Protection Clause. *Annis v. County of Westchester*, 36 F.3d 251, 254-55 (2d Cir. 1994) (listing cases).[5] However, the Fifth Circuit has suggested that Title VII does preclude some Section 1983 claims. *Huckabay v. Moore*, 137 F.3d 871, 879 & n.8 (5th Cir. 1998) (Fifth Circuit will not hear claims under both Title VII and § 1983 unless grounds for relief are different). So, too, the Seventh Circuit has stated that at least some claims of intentional discrimination under the Constitution are precluded by Title VII. *Waid v. Merrill Area Public Schools*, 91 F.3d 857, 862 (7th Cir. 1996) (holding that pre-1991 Title VII claim preempted any claims for equitable relief under the Constitution). *Cf. Hughes v. Bedsole*, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995) (failure to pursue Title VII claim precluded asserting constitutional claim under § 1983).

At the same time, several circuits (including the court below) have held that Title VII does preclude a claim by a private plaintiff under Title IX for employment discrimination by educational entities receiving federal funds. *Waid v. Merrill Area Public Schools*, 91 F.3d 857,

---

[5] There is some irony in the conclusion that Title VII, which has a fairly detailed regime for lawsuits by private individuals, does *not* preclude a claim under the Constitution, while Title IX, which has no explicit authorization of private causes of action at all, does. If the *Congressional* enforcement scheme in Title IX were sufficiently "comprehensive," this Court probably would not have felt obliged to create a private cause of action at all.

862 (7th Cir. 1996) (equitable claims under Title IX precluded by Title VII enforcement scheme); *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995) (private claim under Title IX for damages for employment discrimination precluded by Title VII). Other courts have suggested to the contrary. *E.g.*, *Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994) ("This implied right [under Title IX] extends to employment discrimination on the basis of gender by educational institutions receiving federal funds"); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (reversing dismissal of Title IX employment discrimination claim). *See generally Bedard v. Roger Williams University*, 989 F. Supp. 94, 97 (D.R.I. 1997) (noting dispute in federal courts on this issue).

It is easy to envision other such arguments. Section 1981 covers racial discrimination in the making of contracts, including those made under color of state law. 42 U.S.C. § 1981(c). Plainly, such conduct perpetrated under color of state law also violates the Constitution, and one could easily argue that Section 1981 "subsumes" claims under the Constitution. So, too, Title II of the Civil Rights Act of 1964 precludes discrimination in public accommodations where such discrimination is mandated by a state custom or rule. 42 U.S.C. § 2000a-1. One could easily argue that Title II "subsumes" claims under the Constitution for such conduct, although this Court's opinion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) certainly suggests the contrary.

Finally, if Title IX has a "comprehensive" remedial scheme, it should preclude claims against single-sex colleges under the Constitution although, again, this Court's opinions would suggest otherwise. *E.g.*, *Mississippi Uni-*

versity for Women v. Hogan, 458 U.S. 718 (1982). In *Hogan*, of course, this Court opined that it was "far from clear" that Congress had intended to eliminate claims against single-sex colleges under the Equal Protection Clause, and sustained exactly such a claim in the case before it. *Id.* at 732.

This action gives this Court an excellent opportunity to further explicate its "implied repeal" holdings and provide guidance to the lower courts -- not only with respect to the specific issue raised here, but also on the general process of harmonizing overlapping civil rights laws.

III. THE LOWER COURT'S HOLDING HAS SERIOUS CONSEQUENCES FOR OTHER CASES

In *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), this Court certainly suggested (albeit in *dicta*) that a constitutional claim against individuals acting under color of state authority for sexual harassment could still be maintained despite the failure of a claim against the recipient of federal funds under Title IX. *Id.* at 293 ("Our decision does not affect any right of recovery that an individual may have against . . . the teacher in his individual capacity . . . under 42 U.S.C. § 1983"). *Compare Canty*, 54 F. Supp. 2d at 77 (preclusion theory of *Smith v. Robinson*, applied to Title IX sexual harassment case, requires dismissal of claims against individuals under the Constitution and 42 U.S.C. § 1983); App. 15a-16a (Title IX remedial scheme is comprehensive despite the fact that it does not permit claims against individuals).

One of the most serious consequence of the Title

IX "preclusion" theory is that it will, in many instances, render victims of discrimination by state actors without *any federal remedy at all*. Whenever a lower-level agent of a state educational agency receiving federal funds engages in sexually discriminatory or harassing conduct, the victim will be able to recover against the agency under Title IX only if an official with the capacity to take corrective action had actual knowledge of the conduct and was deliberately indifferent to it. *Gebser*, 524 U.S. at 292. Because Title IX focuses on recipients of federal funds, many circuit courts, like the court below, have held that individuals (who do not receive federal funds) cannot be sued thereunder. *E.g.*, *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999); *Kinman v. Omaha Public School Dist.*, 171 F.3d 607, 610-11 (8th Cir. 1999) (citing cases); App. 15a. Finally, under the "preclusion" theory, the victim cannot sue those individuals under the Constitution and 42 U.S.C. § 1983.

The same result would follow under Title VI -- as it did in this case -- because Title VI "is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs." *Gebser*, 524 U.S. at 289. Thus, the receipt of federal funds by police departments, for example, would preclude any claims under the Constitution for racially discriminatory or harassing conduct by individual police officers, and preclude any federal recovery for the victims of such conduct unless an official with remedial powers knew about, and condoned, the offensive conduct.

It deserves mention that the court below did not engage in any independent analysis of defendants' conduct under the Constitution, or assess whether such analysis

would be the same as the analysis under Title IX.[6] Thus, the court below did not directly address whether defendants' conduct would survive constitutional analysis.

For this reason, the preclusion of petitioners' constitutional claims here has a startling consequence. The courts below relied on the OCR Policy Interpretation to defeat petitioners' Title IX claim. That interpretation permits educational institutions to favor the interests and abilities of one sex over the other rather than treat them

---

[6] The court below did briefly examine petitioners' claim that the Title IX itself was unconstitutional as applied. Relying on its earlier decision in *Kelley*, the court concluded that (1) Title IX was not remedial (designed to increase opportunities for women) but rather designed simply to prohibit discrimination on the basis of sex and (2) allowing consideration of sex was an appropriate means of prohibiting discrimination based on sex. App. 13a-14a. Since discrimination is the very act of considering and weighing a particular characteristic, the analysis of the court below is truly incomprehensible, even on its own terms. Indeed, if it were really a serious attempt to find an "extremely persuasive justification" under this Court's Equal Protection jurisprudence, its analysis -- *non-remedial* discrimination is needed to *prevent* discrimination -- would be reason enough to grant the writ.

In any event, a claim that a statute is unconstitutional because it *permits* certain conduct is far different from a claim that a state actor who has engaged in that conduct has violated the Constitution. Plainly, the university in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) had engaged in conduct (excluding a male from a female single-sex university) specifically permitted by Title IX, and no one claimed that the exception for single-sex colleges rendered Title IX itself unconstitutional. Those facts were irrelevant to this Court's holding: that the same conduct *by a state actor* violated the Equal Protection Clause. So, too, and although no one would dispute its constitutionality, Title VII permits race-conscious conduct that can be challenged under the Constitution when state employers do it. *Cf. Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 627 n.6 (1987).

equally. Indeed, men's teams were cut in this case despite evidence that men's interest were already being accommodated by defendants *less* well than women's interests -- and no evidence to the contrary.

When courts defer to the agency interpretation of a statute *and* preclude claims under the Constitution, the regulatory interpretation essentially takes on the mantle of irrebuttable constitutional law. *Cf. Miller v. Johnson*, 515 U.S. 900, 923 (1995) ("we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions . . . When the Justice Department's interpretation of the [Voting Rights] Act compels race-based districting, it by definition raises a serious constitutional question . . . and should not receive deference"). Since the constitutional claims were dismissed on an initial Rule 12(b)(6) motion, defendants otherwise (*i.e.*, without the "preclusion" defense) would have been obligated to demonstrate that the complaint on its face demonstrated the extremely persuasive justification required by this Court's jurisprudence. If agency statutory interpretations are allowed to substitute for such a showing, the Constitution itself is at risk.

Before allowing such a blithe delegation of authority to a federal agency to stand, this Court should at least consider the consequences of that delegation to the fundamental proposition, unchallenged since *Marbury v. Madison*, 5 U.S. 137 (1803), that it is the special role of the courts -- and, particularly, *this* Court -- to interpret the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW, Suite 300
Washington, DC 20036
(202) 833-8400

Louis Goldstein
GOLDSTEIN & FLUXGOLD
33 North Dearborn St.
Suite 1015
Chicago, IL 60602
(312) 726-7772

Donald W. Anderson
DANIELS, MAURO & PINSEL
19 North County St.
Waukegan, IL 60085
(847) 623-5900

APPENDIX
TABLE OF CONTENTS

	Page
Court of Appeals' Order Denying Motion for Rehearing (January 19, 2000)	1a
Court of Appeals' Opinion (December 3, 1999)	3a
District Court's Amended Final Judgment (February 26, 1999)	21a
District Court's Opinion Dismissing Remaining Claims (February 3, 1999)	24a
District Court's Opinion Adopting in Part the Report and Recommendation of the Magistrate Judge (October 6, 1997)	40a
Report and Recommendation of the Magistrate Judge (June 12, 1997)	76a

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 19, 2000

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

No. 99-1561

BOULAHANIS, et al.	]Appeal from the
	]United States
Plaintiffs-Appellants,	]District Court for the
	]Central District of
v.	]Illinois
	]
BOARD OF REGENTS, ILLINOIS STATE UNIVERSITY, et al.	]No. 95 C 1371
	]
	]
Defendants-Appellees.	]Joe Billy McDade,
	]Chief Judge.
	]

ORDER

Upon consideration of the Plainfiffs-Appellants' petition for rehearing, filed on January 3, 2000, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby DENIED.

In the United States Court of Appeals For the Seventh Circuit

No. 99-1561

Chris Boulahanis, Edward C. Vanduyne, Jamie R. Burton, et al., Plaintiffs-Appellants,

v.

Board Of Regents, a body politic and corporate, Illinois State University, Thomas Wallace, et al., Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division. No. 95 CR 1371 -- Joe Bill McDade, Chief Judge

Argued Oct. 27, 1999 -- Decided Dec. 3, 1999.

Before Harlington Wood, Jr., Flaum, and Evans, Circuit Judges.

Flaum, Circuit Judge. The plaintiffs-appellants, a group of former and prospective athletes at Illinois State University (the "University"), appeal the district court's grant of summary judgment to the University, alleging that the actions of the University in eliminating its men's wrestling and men's soccer programs constitute a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. In addition, the plaintiffs-appellants appeal the district court's dismissal of various claims of sex discrimination and race discrimination under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) arising out of the same University actions, arguing that the district court incorrectly

deemed those claims to be preempted. For the reasons set out below, we agree with the judgment of the district court and affirm.

I. Facts

In the fall of 1993, the Gender Equity Committee of Illinois State University undertook a year-long investigation of gender equity and Title IX compliance at the University. The results of this study indicated that enrollment at the University was 45% male and 55% female, while athletic participation was 66% male and 34% female. The study concluded that these numbers did not constitute equitable participation opportunities for women. In response to this conclusion, the University began to consider ways to bring itself into compliance with Title IX.

Under Title IX, Illinois State University is required to "provide equal athletic opportunity" for men and women. 34 C.F.R. § 106.41(c). Equal opportunities are to be evaluated according to the following ten factors:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity.

Id. In addition to these considerations, an "institution may violate Title IX solely by failing to accommodate the interests and abilities of student athletes of both sexes." *Kelley v. Board of Trustees*, 35 F.3d 265, 268 (7th Cir. 1994) (*citing Roberts v. Colorado St. Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 897-98 (1st Cir.1993)).

In order to effectively accommodate the athletic interests of both male and female students, the University had three options under the policy interpretations of Title IX promulgated by the Office of Civil Rights: (1) provide participation opportunities for men and women that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students; or (2) demonstrate a history and continuing practice of program expansion for the under-represented sex; or (3) fully and effectively accommodate the interests and abilities of the underrepresented sex. 44 Fed.Reg. 71,418 (1979). Because the University had not added a women's sports program in over ten years, and because it did not believe it could accommodate effectively the interests and abilities of its women students, the University focused on achieving the goal of substantial proportionality. The University's desire to bring itself into compliance with Title IX through a showing of substantial proportionality was intensified by a 1995 audit by the National Collegiate Athletic Association. The results of that audit showed that the University was not in conformity with the requirements of Title IX.

The University considered ten options to achieve compliance with Title IX. These options included: (1) dropping men's wrestling; (2) dropping men's wrestling and men's soccer; (3) dropping men's wrestling, men's soccer, and men's tennis; (4) dropping men's

wrestling and adding women's soccer; (5) dropping men's wrestling and men's soccer and adding women's soccer; (6) dropping men's wrestling, men's soccer, and men's tennis and adding women's soccer; (7) adding women's soccer; (8) adding women's soccer and bringing women to full funding; (9) dropping men's wrestling and men's soccer, adding women's soccer, and adjusting men's rosters and women's grants in aid; and (10) dropping men's wrestling and men's soccer, adding women's soccer, and adjusting men's rosters and grants in aid for both men and women. After careful consideration of these options, the University ultimately chose and implemented option number ten. This resulted in the addition of women's soccer and the elimination of men's soccer and men's wrestling. The implementation of this plan increased the athletic participation of women to 51.72% and decreased the athletic participation of men to 48.29%, thereby bringing the disparity between enrollment and participation to within three percentage points.

The plaintiffs-appellants are former members of the men's soccer and men's wrestling teams at Illinois State University who, as a consequence of the University's elimination of those programs under its gender equity plan, were no longer able to participate in those sports at the University. They contend that the University's decision to eliminate the programs in which they participated was based on sex, and is therefore a violation of Title IX. They also allege various violations of their constitutional rights under both § 1983 and § 1985(3). The district court granted the University summary judgment on the Title IX claim, and dismissed the constitutional claims as preempted by the availability of a Title IX claim. It is from these decisions that the plaintiffs-appellants now appeal.

II. Analysis

We review the district court's grant of summary judgment to Illinois State University de novo. *See Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 742 (7th Cir. 1999). In order to overcome summary judgment, the plaintiffs-appellants must show specific facts sufficient to raise a genuine issue for trial. Fed.R.Civ.P. 56(c); *see Shermer v. Illinois Dep't of Transp.*, 171 F.3d 475, 477 (7th Cir.1999) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). In determining whether a genuine issue of material fact exists, we must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *See Senner v. Northcentral Technical College*, 113 F.3d 750, 754 (7th Cir.1997). "A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146, 149 (7th Cir.1994).

A.

Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The plaintiffs-appellants contend that the University's actions in eliminating the men's soccer and men's wrestling programs were based solely on the sex of the participants. According to the plaintiffs-appellants, because these discriminatory actions would not have been taken "but for" the sex of the participants, the actions violate Title IX on its face. *See International Union v. Johnson Controls,*

Inc., 499 U.S. 187, 200, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (*quoting Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (citation omitted) (stating that the simple test for discrimination is "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would have been different'")).

The plaintiffs-appellants' argument is similar to one this Court has already considered in *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir.1994). The plaintiffs in Kelley were members of the men's swimming team at the University of Illinois. That program was eliminated in an attempt by that university to cut its athletic budget by getting rid of teams that were not competitive on a national level. Although the men's swimming team at the University of Illinois was eliminated on this basis, the women's swimming program was maintained because of concerns about compliance with Title IX. *Id.* at 269. Members of the University of Illinois's men's swimming team, like the plaintiffsappellants in this case, challenged the university's cancellation of the athletic program in which they participated as a violation of Title IX. We rejected that challenge, holding that the elimination of men's swimming did not violate Title IX because "men's participation in athletics [continued] to be more than substantially proportionate to their presence in [the University of Illinois's] student body." *Id.* at 270.

The plaintiffs-appellants contend that our decision in Kelley is distinguishable from the facts of this case, and is therefore not controlling. In attempting to distinguish Kelley, the plaintiffs-appellants rely on the financial and budgetary considerations that motivated the University of Illinois's athletic department to eliminate men's swim-

ming. *See id.* at 269. According to the plaintiffs-appellants, a decision that is motivated by financial concerns, even if it includes sex-based considerations, does not violate Title IX. In contrast, a decision like the one in this case, that is motivated by the sex of the participants, does violate Title IX. In short, the plaintiffs-appellants attempt to draw a distinction between decisions in which sex is a consideration (as in *Kelley*) and decisions in which sex serves as the motivating factor (as in the present case).

We are not persuaded by the plaintiffs-appellants' attempt to distinguish decisions to eliminate athletic programs motivated by financial concerns from those based on considerations of sex. That distinction ignores the fact that a university's decision as to which athletic programs to offer necessarily entails budgetary considerations. For universities, decisions about cutting or adding athletic programs are based on a consideration of many factors including: the total size of the athletic department, which is governed by budgetary considerations, and the distribution of programs among men and women, which is governed by Title IX concerns. To say that one decision is financial, while another is sex-based, assumes that these two aspects can be neatly separated. They cannot. Absent financial concerns, Illinois State University presumably would rather have added women's programs while keeping its men's programs intact. Similarly, in the absence of Title IX concerns, the University of Illinois in *Kelley* would have cut both its men's and women's swimming programs in order to save money. Ultimately, both the decision of the University in this case and the decision of the University of Illinois at issue in *Kelley* were based on a combination of financial and sex-based concerns that are

not easily distinguished.[1]

When analyzed against the backdrop of the multiple concerns at work in a university's decision to eliminate an athletic program, the plaintiffs-appellants' argument raises significant practical concerns. In *Kelley*, we held the policy interpretations issued by the Office of Civil Rights to be a reasonable exercise of that agency's congressionally-delegated discretion to interpret the law. *Kelley*, 35 F.3d at 270-71 (holding that the policy guidelines are entitled to deference because they are neither arbitrary or capricious, nor manifestly contrary to the statute) (*citing Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (stating that where Congress has expressly delegated the task of interpretation to an agency the resulting interpretations are to be granted "controlling weight")); *see also Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (stating that "[t]he degree of deference [given to agency interpretations] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX"). Those policy interpretations clearly state that universities may demonstrate compliance with Title IX by showing that participation of the underrepresented sex is substantially proportionate to their enrollment at the university. 44 Fed.Reg. 71,418. In light of this interpretation, a holding that universities cannot achieve substantial proportionality by cutting men's programs is tantamount to a requirement that universities achieve substantial

---

[1] This is clearly illustrated by the fact that the University of Illinois "did not eliminate the women's swimming program because the school's legal counsel advised that such action would put the [u]niversity at risk of violating Title IX." *Kelley*, 35 F.3d at 269.

proportionality through additional spending to add women's sports programs. This result would ignore the financial and budgetary constraints that universities face. *See Roberts v. Colorado St. Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.1993) ("[I]n times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletic programs."). Unless we are willing to mandate such spending, the agency's substantial proportionality rule must be read to allow the elimination of men's athletic programs to achieve compliance with Title IX.

The plaintiffs-appellants do not see such potential spending mandates as a problem because they read *Kelley* to permit the elimination of men's programs in order to address budgetary concerns. At the same time, they assume that such financially-motivated decisions can be readily discerned by courts. Yet given the practical difficulty of distinguishing financial and sex-based concerns, the effect of accepting such a distinction would only force universities under serious budget constraints to cast decisions made under the shadow of Title IX as financial ones. To be safe, they might even go so far as to add women's programs in order to create the kind of budgetary constraints that would justify cutting men's programs. In either case, the plaintiffs-appellants would be no better off than they are under existing law. Because we conclude that the plaintiffs-appellants' distinction would place universities in an unmanageable position, we reject the plaintiffs-appellants' attempt to distinguish *Kelley*.

As we noted in *Kelley*, the elimination of men's athletic programs is not a violation of Title IX as long as men's participation in athletics continues to be "substan-

tially proportionate" to their enrollment.[2] *See Kelley*, 35 F.3d at 270. After the elimination of men's soccer and men's wrestling at the University, the athletic participation of men remained within three percentage points of enrollment. The plaintiffs-appellants do not contend that this disparity is outside the requirements of substantial proportionality. Because the University has achieved substantial proportionality between men's enrollment and men's participation in athletics, it is presumed to have accommodated the athletic interests of that sex. *See Kelley*, 35 F.3d at 271; *see also Roberts*, 998 F.2d at 829 ("'[S]ubstantial proportionality' between athletic participation and undergraduate enrollment provides a safe harbor for recipients under Title IX."); *Cohen*, 991 F.2d at 897-98 ("[A]

---

[2] In an amicus brief to the Court, a group composed of various high school athletic associations argues that Title IX's attempt to prohibit sex based discrimination at federally-funded institutions, when coupled with the use of substantial proportionality as a benchmark for compliance and the budgetary constraints that universities face, has the perverse consequence of forcing institutions to decrease athletic opportunities for men. As the amici note, such a result does not, at least when viewed in isolation, benefit women. According to the amici, a possible solution to this is to allow institutions subject to suit under Title IX to assert Title VII defenses.

It is difficult to see how Title VII defenses could be applied in Title IX cases. As we stated in *Kelley*, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." *Kelley*, 35 F.3d at 270 (*citing Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong. Rec. 5,807 (1972) (statement of Sen. Birch Bayh); 117 Cong. Rec. 30,407 (1971) (same)). Given the unique problems raised by discrimination in athletic opportunity, it would be inappropriate to import a body of law developed in other contexts.

university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup."). Under such circumstances, Illinois State University's actions in eliminating the programs at issue do not constitute a violation of Title IX.

B.

The plaintiffs-appellants next contend that if Title IX is construed to permit the elimination of men's programs for reasons of sex, then Title IX as interpreted would violate the Equal Protection Clause. The plaintiffs-appellants' argument is based on the idea that discrimination based on sex is permissible only when it is substantially related to an important government objective. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (establishing an intermediate standard of scrutiny for sex discrimination); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (same). The plaintiffs-appellants do not challenge the assertion that assisting an under-represented group to achieve additional opportunities would constitute an important government objective. They do argue that when viewed in isolation, the elimination of men's wrestling and men's soccer only served to decrease opportunities for men without providing any additional opportunities for women. As such, the plaintiffs-appellants contend that increased opportunities for women cannot be the important government objective justifying this sex-based discrimination by the University.

As was the case with plaintiffs-appellants' first claim, this Court addressed the equal protection issue in *Kelley* and rejected it. As we held in *Kelley*, "Title IX's

stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex." *Kelley*, 35 F.3d at 272. The elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of Illinois State University in eliminating the men's soccer and men's wrestling programs were substantially related to that objective. *See id.* (*citing Mississippi Univ. for Women*, 458 U.S. at 728, 102 S.Ct. 3331 ("[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.")). In light of these conclusions, we repeat our holding in *Kelley* that "[w]hile the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution." *Id.*

C.

The plaintiffs-appellants also brought numerous claims against both the University and individual University officials under § 1983 and § 1985(3) of Title 42, arguing that they have a protected property interest in participating in athletics. The district court dismissed these claims under our decision in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996). In that case, we held that the availability of a Title IX claim preempted claims under § 1983. *Id.* at 862. This holding was based on our interpretation of Title IX's statutory scheme, and our understanding that "Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution."

Id. at 863. We further determined that, "through the establishment of [Title IX's] statutory regime, Congress effectively superseded a cause of action under § 1983...." *Id.*

1. Sex-Based Discrimination Under Section 1983

The plaintiffs-appellants do not dispute the general preemption principle set forth in *Waid*, but they do contend this principle is not applicable to their Section 1983 claims based on sex discrimination. The plaintiffs-appellants' argument rests on the idea that the existence of preemption depends on the availability of a claim under Title IX, and a distinction between claims against institutions and claims against individuals. We have previously held that Title IX provides for suit only against institutions; it does not allow for suits against individual defendants. *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir.1997). The plaintiffs-appellants contend that because individual claims are not available under Title IX, individual claims must be available under Section 1983. Under this interpretation of *Waid*, Title IX preempts only Section 1983 suits against institutions, and the district court erred in dismissing the plaintiffs-appellants' claims against the individual defendants. After a review of our holding in *Waid*, we disagree.

By focusing on the availability of a claim against individual defendants, the plaintiffs-appellants misconstrue the doctrine of preemption. In providing for the remedies available under Title IX, Congress has created a regime for the redress of sex discrimination in athletic opportunities at federally-funded institutions. In order to be comprehensive, that regime need not include possible claims against both the institution and individuals involved. The

fact that individual claims are not available under Title IX means that Congress has chosen suits against institutions as the means of redressing such wrongs. *See Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (holding that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"). As we noted in *Waid*, in establishing Title IX, "Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions." *Waid*, 91 F.3d at 862. Here plaintiffs-appellants have a Title IX claim against Illinois State University. Under our holding in *Waid*, the district court was correct in determining that the availability of that claim preempts the remedies available for sex discrimination under Section 1983.

2. Race-Based Claims Under Section 1983 and Section 1985(3)[3]

The plaintiffs-appellants also contend that the district court erred in dismissing their constitutional claims based on racial discrimination under Section 1983 and Section 1985(3). The district court determined that these claims, like the sex-based claims brought under Section 1983, were preempted by the availability of a Title IX

---

[3] Section 1985(3) provides that "[i]f two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages...." 42 U.S.C. § 1985(3).

claim. The court reasoned that Title IX was the exclusive means Congress provided for the redress of sex discrimination at federally-funded institutions, and that this exclusivity precluded any claim under Section 1983 and Section 1985(3) even in regard to claims based on racial discrimination. While we agree with the district court in regard to sex-based claims, its reasoning as to the race-based claims does not take into consideration that Title IX should serve as the exclusive source of claims against federally-funded institutions only when sex-based discrimination is alleged; when the discrimination at issue is race-based, Title IX preemption does not apply.

Nevertheless, the district court came to the correct result. The proper means of asserting claims based on allegations of racial discrimination by the University is Title VI, which prohibits "discrimination under any program or activity receiving Federal financial assistance" based on "race, color, or national origin." Civil Rights Act of 1964, § 601 of Title VI, 42 U.S.C. § 2000d. The plaintiffs-appellants made a Title VI claim alleging race discrimination before the district court, and the court resolved that claim against the plaintiffs-appellants on summary judgment.[4] We have previously held that the

---

[4] The district court reasoned that, even assuming the plaintiffs-appellants made a proper statistical showing of disparate impact, the University's desire to comply with Title IX was a legitimate non-discriminatory reason for its actions in eliminating the men's wrestling and men's soccer teams. Once the University presented a legitimate non-discriminatory reason for its actions, the plaintiffs-appellants were required to come forward with equally effective alternatives with less disparate impact. Because the plaintiffs-appellants failed to carry this burden by providing such alternatives, the district court granted the University's motion for

(continued...)

availability of this claim precludes resort to a Section 1983 claim based on the same allegations of race discrimination. *Alexander v. Chicago Park District*, 773 F.2d 850, 856 (7th Cir.1985) ("[W]e hold that private actions based on Title VI may not be brought under § 1983."). Our logic in *Alexander* was based on our understanding that "where a statute provides its own comprehensive enforcement scheme that scheme may not be bypassed by pleading an underlying violation of the statute and bringing suit directly under § 1983." *Id.* This logic applies equally to Section 1985(3) claims, because pleading under that statute would also allow plaintiffs to circumvent the comprehensive structure Congress created to address the problem of racial discrimination at federally-funded institutions. *See Great Am. Federal S. & L. v. Novotny*, 442 U.S. 366, 378 (1974) (holding that Title VII may not be bypassed through resort to Section 1985(3)). Where Congress has set up an enforcement mechanism with full remedies, as it has with Title VI, that regulatory structure may not be bypassed by resort to laws of more general applicability like Section 1983 and Section 1985(3). *See National Sea Clammers*, 453 U.S. at 20, 101 S.Ct. 2615; *see also Waid*, 91 F.3d at 862-63 (arguing that "access to the full panoply of judicial remedies" is an indication that Congress intended a statutory regime to be exclusive).

III. Conclusion

The district court correctly determined that the actions of Illinois State University in eliminating its men's soccer and men's wrestling programs did not violate Title

---

[4](...continued)
summary judgment on the plaintiffs-appellants' Title VI claim. *See Harper v. Board of Regents*, 35 F.Supp.2d 1118, 1124 (C.D.Ill.1999).

IX or the Equal Protection Clause. The district court also correctly held the plaintiffs-appellants' remaining constitutional claims to be preempted. Accordingly, we AFFIRM the decision of the district court.

AFFIRMED

HARLINGTON WOOD, Jr., Circuit Judge, concurring.

I fully join in this well-reasoned opinion, and only expand on a thought already expressed.

The ideal situation, though not anticipated as a practical matter, might nevertheless sometime surprisingly arise; that would be where a university has the money and the desire to accommodate all its students of either sex who have the interest and sports ability to be competitive. Even if not competitive on a national level, it should suffice to be competitive at least at conference level. The extra sports funding needed may not show up in the budget. However, a school recognizing the many advantages of a broad sports program might be able to tighten up less important aspects of its budget in order to help fund its athletic programs for eligible students of both sexes. The legislature, realizing the situation, might also respond favorably. Under those conditions, I would expect the school not to be curtailed in its sports programs because of a proportionality formula which, in that situation, would be irrelevant. Student athletes would neither be helped nor hindered by the proportionality formula. Participation is more important than percentages.

One point concerning the financial aspect of this case does concern me. In the school's brief, reference is made to "Appellants' implication" that the Athletic Depart-

ment would have $400,000 in unexpected revenues due to pending legislation which was awaiting the Governor's signature. Plaintiffs argued that, because of the predicted influx of money, this case is distinguished from *Kelley* in that it was not based on both budgetary and gender considerations, but solely upon gender. Plaintiffs asserted that, if received, the $400,000 would have provided sufficient funds to maintain the men's soccer and wrestling teams and add female sports programs. The school does not directly deny that the sum may have, at some point, become available to the Athletic Department. The school's answer is merely that there is nothing in the record about it. As we cannot go outside the record, I am willing to assume that the school is not purposely avoiding a direct answer. However, if that extra money was, in fact, available, I would not decide this case on summary judgment but would send it back for exploration of the Athletic Department's financial situation.

United States District Court

CENTRAL DISTRICT OF ILLINOIS

[Filed February 26, 1999]

AMENDED JUDGMENT IN A CIVIL CASE

RITA HARPER, CHRIS BOULAHANIS, EDWARD C. VAN DUYNE, JAMIE R. BURTON, JUSTIN STONE, BRYAN S. SIMKINS, GREGORY J. HALL, KEVIN BRACKEN, GERALD DE LIRA, JR., JEFFREY L. CASTOR, JR., MICHAEL F. BRUX, MICHAEL B. LUCIER, ROGER PASCUAL, MARK HIBNER, KERRIE ANN BRACKEN, SHANNON J. DUFFY, PATRICK R. MANNING, MATT WEBSTER AND KEVIN HAYNES

vs.

Case Number: 95-1371

BOARD OF REGENTS, a body politic and corporate, ILLINOIS STATE UNIVERSITY, THOMAS WALLACE, RICK GREENSPAN, LINDA HERMAN, DONNA TAYLOR, DAVID STRAND, LOREN BROWN, JIM GRIMM, JIM JOHNSON, PRISCILLA MATTHEWS, JEAN MEMKEN, KEN NEWGREN, BETH VERNER, ALBERT OTTO, DEB AMDOR, ROLLIE MERCER, JILL HUTCHISON, BRIDGETT BARTOWIAK, JACK NIEMI, MELANIE WARD, DON SPANIAK, JESUS VASQUEZ, TRACY DJERF, LEANNA BORDNER, JOSEPH EBBESEN, CARL KASTEN, NANCY MASTERSON, PATRICIA MCKENZIE, JAMES MYLES, BARBARA SCHEIBLING, NIRANGAN SHAH, MYRON SIEGEL, WILLIAM SULASKI, GRETCHEN WINTER, WILLIE FOWLER, MILES MCGREW, AMY MERSINGER, BILL TOLONE, MIKE REETER, AND DOES I THROUGH 20 INCLUSIVE

DECISION BY THE COURT. This action came to hearing before the Court. The issues have been heard

and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, pursuant to the Order entered October 6,1997 granting in part the defendant's motion to dismiss the following claims and parties WITH PREJUDICE:

Counts I-III - Greenspan, Herman, Taylor, Wallace, Brown, Grimm, Johnson, Matthews, Memken, Newgren, Verner, Otto, Amdor, Mercer, Bartowiak, Niemi, Ward, Spaniak, Vasquez, Djerf, Reeter, Tolone, Ebbesen, Kasten, Masterson, McKenzie, Myles, Scheibling, Shah, Siegal, Sulaski, Winter, Fowler, McGrew, Mersinger.

Count IV - The same defendants named in Counts I-III, plus Jill Hutchison.

Count V - The same defendants named in Count IV.

Count VI - Wallace, Greenspan, Hutchison, Herman

Count VII - Bordner, Herman

Count VIII - The same defendants named in Counts I-III, plus Jill Hutchison.

Count IX - Wallace, Greenspan, Herman, Taylor

Count XI - The same defendants named in Counts I-III.

IT IS FURTHER ORDERED, pursuant to the Order of October 6, 1997, Defendant's Motion to Dismiss WITH PREJUDICE the individual defendant, Jill Hutchison, in her individual capacity with respect to Count X, is granted. FURTHER ORDERED, pursuant to the Order of October 6,1997, Defendant's Motion to Dismiss WITH PREJUDICE the University and Board of Regents on Counts II, III, V, VII, IX, X and XI is granted.

IT IS FURTHER ORDERED, pursuant to the Order of February 3, 1999, that judgment is entered in favor of Defendant and against Plaintiffs on Counts I, IV, and X of Plaintiff's Second Amended Complaint.

IT IS FURTHER ORDERED, pursuant to the Order of February 3, 1999, that count IX of Plaintiff's Second Amended Complaint is DISMISSED WITHOUT PREJUDICE. Case is terminated.

IT IS FURTHER ORDERED, pursuant to the Order of February 26, 1999, that Plaintiff Rita Harper is dismissed without prejudice.

ENTER this 26th day of February, 1999

JOHN M. WATERS, CLERK

/s/

BY: DEPUTY CLERK
UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

RITA HARPER, et al.,

Plaintiffs,

V. Case No. 95-1371

BOARD OF REGENTS, et al.,

Defendants. **[Filed and Entered on February 3, 1999 C.D.Ill]**

ORDER

McDADE, Chief Judge.

Now before the Court is Defendants' Motion for Summary Judgment on the remaining counts of Plaintiffs' Complaint. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, as Plaintiffs bring claims under Title IX, Title VI, and the First Amendment.

Background

In 1993, Illinois State University's ("ISU" or the "Univeristy") Gender Equity Committee (the "Committee") undertook an investigation and evaluation of athletic data relevant to gender equity and Title IX compliance with the stated purpose of achieving gender equity for the areas examined. The Committee's efforts ultimately resulted in the issuance of the Gender Equity Committee Report (the "Report") in Fall 1993 that noted a disparity between the percentage of female students in the undergraduate population at the University and the percentage of female participants in the intercollegiate athletics programs

offered. The Athletic Department was to review the Report and incorporate it in the long range planning process for the University. In January 1995, the NCAA Peer-Review Committee conducted an audit of ISU and determined that the University was not in substantial conformity regarding gender equity as it had no written plan to achieve gender equity in place two years after the completion of the Report.

After consideration of various alternatives, ISU's Department of Intercollegiate Athletics submitted a gender equity plan to the University president and legal counsel in 1995 that included a recommendation to eliminate men's wrestling and soccer, as well as add women's soccer, men's roster management, and full grants/aid for both men and women. This recommendation was submitted to the Athletic Council on March 22, 1995 and April 26, 1995, and the recommendation received its support.

This process culminated in the official decision in Spring 1995 to eliminate the men's intercollegiate soccer and wrestling programs and add a women's intercollegiate soccer program.[1] The parties dispute who actually made this decision, but they agree that Linda Herman ("Herman"), ISU's Associate Athletic Director, was actively involved in the decision-making process and that the University president, Thomas Wallace, officially adopted the plan in a memorandum dated April 27, 1995. Accordingly, the men's wrestling and soccer teams were eliminated as intercollegiate sports after the 1994-95 season, and women's soccer was elevated to a varsity level sport for the 1995-96 season.

---

[1] These intercollegiate programs receive federal financial assistance, which brings them under the umbrella of Title IX.

Plaintiffs are present, former, and prospective students and participants in intercollegiate athletic programs at ISU, some of whom were promised full or partial scholarships in either men's wrestling or soccer. On September 22, 1995, they filed an eleven count complaint in this Court. The complaint was amended once on November 13, 1995 and again on May 24, 1996. Following a motion to dismiss, only four counts remain. Count I alleges that Defendants discriminated on the basis of sex in eliminating the men's wrestling and soccer programs in violation of Title IX.[2] In Count IV, Plaintiffs assert a violation of Title VI based on the purported denial of opportunities for minority students to participate in intercollegiate athletic programs on the basis of race. Count IX purports to invoke the supplemental jurisdiction of the Court to entertain state law claims for promissory estoppel and fraudulent inducement. Finally, Count X alleges that Defendant Jill Hutchison ("Hutchison"), ISU's women's basketball coach, infringed the First Amendment rights of two Plaintiffs. Defendants have moved for summary judgment on the remaining counts of the Second Amended Complaint. This Order follows.

Legal Standard

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party may

---

[2] A limited class was certified with respect to this count.

meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir.1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushita Elec. Indus.Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex Corp.*, 106 S.Ct. at 2553. This Court must then determine whether there is a need for trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson*, 106 S.Ct. at 2511.

Discussion

I. Title IX Claim

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs and activities which receive federal funding. *Mary M. v. North Lawrence Community School Corp.*, 131 F.3d 1220, 1224 (7th Cir.1997), *cert. denied*, --- U.S. ----, 118 S.Ct. 2369, 141 L.Ed.2d 737 (1998). Specifically, the relevant portion of Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....
>
> 20 U.S.C. § 1681(a).

In 1975, the Secretary of the Department of Health, Education, and Welfare ("HEW") published regulations implementing the provisions of Title IX with respect to intercollegiate athletic activities. *Kelley v. Board of Trustees,* 35 F.3d 265, 268 (7th Cir.1994); 34 C.F.R. § 106.41(b). In doing so, the school must "provide equal athletic opportunity for ... both sexes." 34 C.F.R. § 106.41(c).

> Equal athletic opportunity is to be evaluated according to a list of ten factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice times; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity.

Id. However, "an institution may violate Title IX solely by failing to accommodate effectively the interests and abilities of student athletes of both sexes." *Kelley,* 35 F.3d at 268. A HEW policy interpretation issued in 1979 provides three benchmarks to determine when an institution has effectively accommodated the interests of both male and female students:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion..., whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed.Reg. 71,418 (1979).

Here, Defendants assert that their action was taken after studies revealed a significant disparity between the percentage of female students and the athletic opportunities available for them on the one hand and the percentage of male students and the athletic opportunities available for

them on the other hand. ISU was therefore attempting to pursue the proportionality benchmark for Title IX compliance described in the HEW policy interpretation.

Plaintiffs contend that because the participants in the men's soccer and wrestling programs were indisputably male, and the programs were purposefully selected for elimination in order to increase the proportion of athletic opportunities available to women at the expense of men, ISU's decision violated Title IX on its face. They criticize the proportionality approach taken by the University as based solely on a desire to act cheaply and with ease, "of dubious legality", and not the least discriminatory alternative available. Plaintiffs further argue that general enrollment statistics tell nothing about the proportions of male and female students who are interested in and qualified for participation in intercollegiate athletics.

Plaintiffs argument that the substantial proportionality benchmark is invalid and of dubious legality on its face is without merit. Courts in this and other circuits have expressly and repeatedly upheld the reasonable application of this mechanism in similar situations as completely consistent with the dictates of Title IX. *See Kelley*, 35 F.3d at 270-72; *Cohen v. Brown University*, 991 F.2d 888, 898 (1st Cir.1993). In fact, the court in *Cohen* went so far as to sanction the reduction of athletic opportunities to the over-represented sex through subtraction or downgrading as an appropriate means of complying with the first benchmark. *Id.*, at 898 n. 15; *see also, Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824, 830 (10th Cir.1993) (finding that "in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirements by continuing to expand their women's athletic programs ... [but] may still comply

with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.")

Although Plaintiffs would have the Court believe that ISU had no reason to suspect that it was not in compliance with Title IX, the Court is aware of no basis in the law requiring an institution to wait until it is either sued or formally investigated to make efforts to come into compliance; to the contrary, self-policing is readily encouraged by the implementing regulations. Furthermore, this assertion is belied by the record as Defendants assert, and Plaintiffs concede, that the NCAA peer-review team informed them that the University was not in substantial conformity regarding gender equity. While some investigation was obviously done prior to making the formally announced decision and some individuals involved in the process may have expressed opinions on the issue, there is no credible evidence suggesting that the ultimate decision was not made in an effort to achieve a more equitable gender balance in athletic opportunities, and the Court will not impute sinister motives simply because Plaintiffs are unsatisfied with the results of these efforts.

Faced with figures demonstrating a substantial overrepresentation among male students in funded athletic programs, ISU determined that it would have to cut a small number of men's intercollegiate programs in order to increase the athletic opportunities available to female students. This determination was based on the fact that men's participation in athletics was more than substantially proportionate to their enrollment at ISU, but women's participation did not even come close. Additionally, although ISU sponsored several women's sports at the

intercollegiate level, the record demonstrates that little had been done in recent history to improve or increase opportunities for women athletes to participate in funded programs.

Much of Plaintiffs' argument goes to the assertion that the chosen method for achieving or increasing compliance was not the least discriminatory method available to the University. However, they can identify nothing in Title IX that requires the institution to choose the method or benchmark for achieving gender parity that has the least negative impact on the overrepresented gender or provides the most convenient solution for men. Rather, the regulations allow institutions to choose among the three benchmarks to bring themselves into compliance. Similarly, their suggestion that the provision of proportional athletic opportunities was unnecessary because female students were not as interested or qualified in athletics as male students has been rejected by other courts as without merit. *See Cohen,* 991 F.2d at 899.

> Under Title IX, the University could cut men's programs without violating the statute because men's interests and abilities are presumptively met when substantial proportionality exists. Conversely, women's programs could not be cut because their level of participation was already disproportionate to their respective enrollment, and thus the University would be vulnerable to a finding of non-compliance with Title IX if the University failed to "fully and effectively accommodate [women's] interests and abilities."

Kelley v. Board of Trustees of University of Illinois, 832 F.Supp. 237, 242 (C.D.Ill.1993). In other words, the members of the men's wrestling and soccer teams have not been discriminated against in violation of Title IX, because "[e]ven though elimination of their program excluded them from varsity participation as individuals, the percentage of all men participating in the varsity program is more than 'substantially proportionate' to the percentage of men represented by the undergraduate population." *Id., citing Cohen*, 991 F.2d at 906; *Roberts v. Colorado State*, 998 F.2d 824 (10th Cir.1993); *Cook v. Colgate University*, 992 F.2d 17 (2nd Cir.1993); *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. 578 (W.D.Pa.1993). Although Plaintiffs' desire to complete their college education and intercollegiate wrestling and soccer at ISU, the school of their choice, is understandable, Title IX does not establish a right to participate in any particular sport at the college of one's choice. *In re United States ex rel. Missouri State High School Activities Assn.*, 682 F.2d 147, 153 n.8 (8th Cir.1982); *Walsh v. Louisiana High School Athletic Assn.*, 616 F.2d 152, 159-60 (5th Cir.1980); *Colorado Seminary v. NCAA*, 570 F.2d 320, 321 (10th Cir.1978).

Plaintiffs make a good showing that ISU handled this decision very poorly and may not have made the best decision theoretically possible, but that is not what is at issue in Count I and is not enough to survive summary judgment. Title IX prohibits gender discrimination by educational institutions, not mere lapses of professional courtesy, consideration, or good judgment, and Plaintiffs have utterly failed to demonstrate that ISU considered gender in any way except for the express purpose of acting to comply or come into compliance with federal law. On the record before the Court, a reasonable jury would have

no basis for finding any motive other than that the University's actions were taken in an attempt to comply with Title IX that was in accordance with the benchmark for measuring compliance set forth in the agency's policy interpretation.[3] *Kelley*, 35 F.3d at 272.

Although Plaintiffs argue that there are many issues of fact, the Court finds none of the identified factual disputes to be material to the resolution of this Title IX claim. While the Court is not unsympathetic to the hardship incurred by the members of the men's wrestling and soccer teams or their disappointment in not being able to pursue the sport of their choice at their chosen institution, Plaintiffs' Title IX claim fails, and Defendants are entitled to judgment as a matter of law with respect to Count I.

II. Title VI Claim

Title VI of the Civil Rights Act of 1964 provides in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d; *Ahern v. Board of Education of the*

---

[3] There can be no reasonable dispute that after the elimination of men's wrestling and soccer and the addition of women's soccer, the proportion of athletic opportunities available to each gender more closely approximated the respective proportions of male and female students at ISU.

City of Chicago, 133 F.3d 975, 976 (7th Cir.1998). As ISU is a recipient of federal funds, it must comply with Title VI. *Id.*

Plaintiffs, as confirmed in their responsive pleadings, do not contend that there is any evidence of intentional racial discrimination in the elimination of the men's wrestling and soccer programs. Rather, they argue that the claim asserted is based on disparate impact on minority athletes. Both the United States Supreme Court and the Seventh Circuit Court of Appeals have recognized the availability of a limited cause of action for disparate impact in holding that "actions having an unjustifiable disparate impact on minorities [may] be redressed through agency regulations designed to implement the purposes of Title VI." *City of Chicago v. Lindley*, 66 F.3d 819, 828 (7th Cir.1995), *citing Alexander v. Choate*, 469 U.S. 287, 293 n. 9, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). Implementing regulations further provide that recipient institutions "may not directly ... utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2); 45 C.F.R. § 80.3(b)(2).

In order to state a claim for racial discrimination as a result of a disparate impact, Plaintiffs must demonstrate that a facially neutral practice has a racially disproportionate impact. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir.1985). Upon this showing, the burden then shifts to Defendants to prove substantial and legitimate justification for the practice. *Id.* If Defendants meet this burden, Plaintiffs must

proffer an equally effective alternative practice which results in less disparate impact in order to prevail. *Id.*

Defendants contend that Plaintiff has failed to show a disparate impact on minority athletes with respect to the elimination of the men's wrestling and soccer programs. Not surprisingly, Plaintiffs contend that this showing has been made.

Initially, the Court notes that the figures presented by both sides differ somewhat. Although both sides agree that ISU's decision resulted in a reduction in minority participation from just under 28% (27.8%) to 27% in all sports, Plaintiff suggests that the true indicator of the impact is the decline from 17% to 14.6% in nonrevenue sports. Defendant argues, and the Court concurs, that there is no principled reason for focusing solely on the non-revenue sports when the inquiry is whether the decision to eliminate two intercollegiate programs had a disparate impact on minority athletic participation opportunities as a whole at ISU. Indeed, the only apparent motive for drawing this distinction would appear to be to superficially inflate a change of less than 1% (.8% to be precise) into a 2.4% reduction in minority opportunities for participation.[4]

Plaintiffs attempted contortions do not change the

---

[4] The category of non-revenue sports apparently includes all intercollegiate sports except football and basketball. As football and basketball account for 56 of the 100 minority students participating in intercollegiate athletics at ISU during the 1994-95 school year, the exclusion of these sports from consideration effectively excludes more than 50% of minority opportunities for athletic participation from the analysis, revealing the arbitrariness and flawed nature of Plaintiffs' categorization efforts.

fact that 35 male athletes who were not minorities also lost their team positions, or that the elimination of the two intercollegiate teams resulted in only an .8% change in minority participation opportunities in ISU athletics. Thus, the impact on minorities demonstrated by Plaintiffs is not disproportionately negative, and the evidence in support of this claim is therefore insufficient to survive summary judgment.

However, even assuming that Plaintiffs have presented statistical evidence of a disparate impact, Defendants have asserted a legitimate non-discriminatory reason for the decision, that being the need to come into compliance with the requirements of Title IX. After making the cursory (and previously rejected) comment that this reason is insubstantial, Plaintiffs then argue that Defendants had alternatives that had less of a discriminatory impact on minorities, as well as men. But alas, Plaintiffs burden is to demonstrate *equally effective* alternatives that result in less disparate impact. *Georgia State*, 775 F.2d at 1417 (emphasis added). The bald assertion that alternatives posing a lesser impact on minorities were available does not even come close to establishing that these alternatives were equally effective in addressing the disparity in athletic opportunities available to female students.[5] As Plaintiffs have utterly failed to meet their burden on rebuttal, no reasonable jury could find in their favor on the Title IV claim, and Defendants are entitled to judgment as a matter of law on Count IV as well.

---

[5] In fact, Defendants' reply brief reveals that the alternatives suggested by Plaintiffs would not have brought the University into substantial compliance with Title IX under the first benchmark and would have caused the University to incur significant additional costs.

III. First Amendment Claim

Count X of the Second Amended Complaint purported to state a cause of action for violation of the First Amendment rights of two plaintiffs. Plaintiffs do not contest the entry of summary judgment on this count, and therefore, the Court finds that Defendants are entitled to judgment as a matter of law with respect to Count X.

IV. State Law Claims

Count IX asserts individual state law claims for promissory estoppel and fraudulent inducement on behalf of Plaintiffs who were recruited into either the men's wrestling or soccer team with the alleged promise that each would either receive or be eligible to receive a scholarship in the future. The precise issues and relevant facts involved are not made clear by either party, and there is an allusion to incomplete discovery with respect to these claims.

Title 28 U.S.C. § 1367 provides that a district court "may decline to exercise supplemental jurisdiction" over pendent state-law claims if the court has dismissed all claims over which it has jurisdiction. *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1250 (7th Cir.1994), *citing* 28 U.S.C. § 1367(c)(3). A district court should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over pendent state-law claims. *Id.* at 1251, *citing Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir.1994). Finally, as a general rule, when all federal claims are dismissed, the district court should relinquish jurisdiction over pendent state-law

claims rather than resolving them on the merits. *Wright,* 29 F.3d at 1250, *citing United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Previously in this Order, the Court determined that Defendant's motion for summary judgment on Plaintiffs' federal Title IX, Title VI, and First Amendment claims should be granted. As no federal claims remain, there can be no question that the remaining state claims predominate. Additionally, whether an Illinois court would find Plaintiffs' allegations sufficient to state a claim for either promissory estoppel or fraudulent inducement is not readily apparent from the pleadings. After weighing the relevant factors of judicial economy, convenience, fairness, and comity, the Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. Accordingly, the Court will dismiss the claims in Count IX without prejudice to their being refiled in state court.

Conclusion

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment [Doc. # 122] is **GRANTED** in part and **DENIED** in part. The Clerk of the Court is directed to enter judgment in favor of Defendant and against Plaintiffs on Counts I, IV, and X of Plaintiff's Second Amended Complaint. IT IS FURTHER ORDERED that Count IX of Plaintiff's Second Amended Complaint is **DISMISSED WITHOUT PREJUDICE.** This case is now **TERMINATED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

RITA HARPER, et al.,

Plaintiffs,

V. Case No. 95-1371

BOARD OF REGENTS, et al.,

Defendants. **[Filed and Entered on October 6, 1997, C.D.Ill]**

ORDER

Before the Court is a Report and Recommendation by U.S. Magistrate Judge, Robert J. Kauffman (#94-1) concerning the Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (#67-1). Also before the Court is Defendants' Motion to Strike Portions of Plaintiffs' Objections to the Report and Recommendation (#99-1). The magistrate judge has recommended that the Motion to Dismiss (#67-1) be granted in part and denied in part.

Both parties have filed certain objections to the magistrate judge's Report and Recommendation. This Court reviews *de novo* the portions of the magistrate judge's recommendations to which the parties have specifically objected, pursuant to 28 U.S.C. § 636(b)(1) and F.R.Civ.P. 72(b). After a thorough review of the Report and Recommendation, the parties' objections, the pleadings, and the relevant case law, this Court adopts the

Report and Recommendation in part and denies it in part (#94-1), which means that Defendants' Motion to Dismiss (#67-1) is granted in part and denied in part. Defendants' Motion to Strike (#99-1) is granted.[1]

With respect to the Motion to Dismiss (#67-1), the Court specifically finds that only portions of Counts I, IV, X and IX of Plaintiffs' Second Amended Complaint survive Defendants' Motion to Dismiss. The Court has determined that Count I, Plaintiffs' Title IX claim, survives only against the University and the Board of Regents; Count IV, Plaintiffs' Title VI claim, also survives only against the University and the Board of Regents; Count X, Plaintiffs' First Amendment claim survives against the individual Defendants in their individual capacities and against the individuals in their official capacities, but only to the extent that Plaintiffs are seeking prospective injunctive relief against these officials; and Count IX, Plaintiffs' Illinois common law claims, survives only against the individual Defendants in their individual capacities and only with respect to the theories of promissory estoppel and fraudulent inducement. None of these counts needs to be repled. The reasons for these findings are as follows.

Eleventh Amendment and Illinois Immunity

Plaintiff's Second Amended Complaint names as Defendants Illinois State University, the Board of Regents,

---

[1] Defendants correctly argue that Plaintiffs have improperly asserted in their objections to the Report and Recommendation matters outside the pleadings and therefore not before this Court. The improper material is contained in the last paragraph on page 4, all of page 5, and in the first two paragraphs of page 6. These portions of the objections are stricken and not considered by the Court for purposes of deciding this motion.

members of the Board in their individual and official capacities, and several University administrators in their individual and official capacities. The magistrate judge held that:

> (1) None of these Defendants were entitled to Eleventh Amendment immunity under Title IX and Title VI;
>
> (2) The University and Board of Regents were entitled to immunity from the section 1983 claims, as were the individual Defendants sued in their official capacities, except to the extent Plaintiffs sought prospective injunctive relief against them; however, the claims against the individual Defendants in their individual capacities could proceed; and
>
> (3) All Defendants were entitled to immunity from Plaintiffs' pendent state law claims.

The Court analyzes each of these conclusions separately. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

Under *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1123 (1996), the Court need ask only two questions to determine whether a particular statute abrogates a state's immunity under the Eleventh Amendment: (1) whether Congress has unequivocally expressed its intent to abrogate the immunity, and (2) whether Congress has acted pursuant to a valid exercise of power.

To meet the second element, the Court need only

discern some legislative purpose or factual predicate to support the exercise of the "appropriate legislation" clause of the Fourteenth Amendment. *E.E.O.C. v. Wyoming*, 460 U.S. 226, 243 n.18 (1983); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 840-41 (6th Cir. 1997).[2] Congress need not actually recite the words "section 51," or "Fourteenth Amendment" or "equal protection." *Id.*; *Woods v. Cloyd W. Miller, Co.*, 333 U.S. 138, 144 (1948). The crucial inquiry is whether the objectives of the Act were within the scope of the Fourteenth Amendment. *Mills v. State of Maine*, 1997 WL 361186, at *4-5 (1st Cir. Jul. 7, 1997); *E.E.O.C. v. Elrod*, 674 F.2d 601, 608 (7th Cir. 1982). *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (upholding legislation under the Fourteenth Amendment even though statute and legislative history did not refer to it); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976) (relying upon legislative history to reconstruct probable intent of Congress in relying on Fourteenth Amendment).

The Court in *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), posed the relevant question as follows: whether the statute "may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Thus, so long as Congress had the power to pass the legislation under the Fourteenth Amendment, the

---

[2] The Commerce Clause is no longer a viable source of abrogation. *Seminole Tribe*, 116 S. Ct. at 1131.

second element for abrogation is met.[3] Moreover, nothing prohibits Congress from passing legislation pursuant to the power given it in more than one provision of the Constitution. *See. e.g.*, *Wyoming*, 460 U.S. at 243 (refusing to decide whether the ADEA could be upheld under the Fourteenth Amendment as well as the Commerce Clause); *Crawford*, 1997 WL 289101, at *6 ("the Americans with Disabilities Act is an exercise of Congress's power under section 5 of the Fourteenth Amendment (as well as under the commerce clause))"; *Elrod*, 674 F.2d at 603 n.1 (finding that the ADEA would be a constitutional exercise of Congress' Commerce Clause powers as well as under the Fourteenth Amendment).

Defendants object to the magistrate's finding that Title IX and Title VI abrogate their Eleventh Amendment immunity. However, there can be no question that 42 U.S.C. § 2000d-7(a)(1) unequivocally expresses Congress' intent to abrogate the states, immunity from Title IX and Title VI claims, thus satisfying the first requirement of *Seminole Tribe*. *See Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Franks v. Kentucky Sch. for the Deaf*, 956 F. Supp. 741, 750-51 (E.D. Ky. 1996).

Moreover, the Court agrees with the magistrate judge that these statutes had as their primary purpose the elimination of gender and race discrimination in educational institutions. *See Cannon v. University of Chicago*, 441 U.S. 677, 686 n.7 (1979); *Kaimowitz v. Board of Trustees of Univ. of Illinois*, 951 F.2d 765, 767 (7th Cir. 1992).

---

[3] *But see Goshtasby v. Board of Trustees of the Univ. of Illinois*, 1997 WL 409401, at *2 (3rd Cir. Jul. 23, 1997) (raising the issue whether *Boerne v. Flores*, 117 S. Ct. 2157 (1997), confines Congress to exercise only the remedial measures defined by the judicial branch).

Thus, Congress surely had the power to pass them pursuant to the Equal Protection Clause of the Fourteenth Amendment. *Crawford*, 109 F.3d at 1283 (*citing United States v. Virginia*, 116 S. Ct. 2264 (1996)); *Franks*, 956 F. Supp. at 751. As indicated above, it makes no difference whether these statutes were actually passed pursuant to Congress, spending powers. Statutes may be permissible under more than one provision of the Constitution. *Wyoming*, 460 U.S. at 243; *Crawford*, 1997 WL 289101, at *6; *Elrod*, 674 F.2d at 603 n.1. The only relevant inquiry is whether Congress *could have* passed these laws under section 5 of the Fourteenth Amendment. *Wyoming*, 460 U.S. at 243 n.18; *Katzenbach*, 384 U.S. at 651; *Woods*, 333 U.S. at 144.

Neither party appears to object to the magistrate judge's ruling as to the effect of Eleventh Amendment immunity, on Plaintiffs, section 1983 claims, although Defendants contend that those claims should be dismissed on various other grounds. In any event, the Court wishes to note its concurrence with the magistrate judge on this point. The Eleventh Amendment does not apply to suits against officials in their individual capacities; thus, those claims may proceed. However, under *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989), the Eleventh Amendment does bar section 1983 actions against a state agency and its officials sued in their official capacities.[4] *See also Kaimowitz*, 951 F.2d at 767. The only exception to this rule is when an official is being sued for prospective injunctive relief only. *Id.*; *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Quern v. Jordan*,

---

[4] A suit against a state official in his or her official capacity is not a suit against the official but rather against the state itself. *Will*, 491 U.S. at 71.

440 U.S. 332, 337 (1979); *Ex parte Young*, 209 U.S. 123, 159-60 (1908). To the extent that such relief is sought here, those claims survive.

Finally, the magistrate judge found that all Defendants were immune from Plaintiffs' pendent state law claims. While Plaintiffs acknowledge the holding in *Pennhurst* that the Eleventh Amendment immunizes state entities and officials being sued in their official capacities from pendent state law claims, 465 U.S. at 120-21, 123-24,[5] they argue that the defendants being sued in their *individual* capacities cannot be immunized in this manner. The Court agrees. *See Benning*, 928 F.2d at 778 ("The Eleventh Amendment doctrine of sovereign immunity does not [] insulate the three individual defendants from liability for their allegedly tortious acts.").

Yet, the matter becomes more complicated by the fact that state rules of immunity -- both statutory and common law -- are binding in federal court with respect to state causes of action. *Id.* at 779 *(citing Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)). Here, Illinois has enacted a statute granting its court of claims exclusive jurisdiction over tort suits against the State. *Id.*; 705 ILCS 505/8(d) (1992). Moreover, Illinois courts have held that acts performed by state officials within the scope of their official duties are to be regarded as acts of the state if the following criteria are met:

---

[5] Indeed, even the exception for prospective injunctive relief in *Ex parte Young* does not apply to pendent state law claims because ordering a state official to conform to state law "is unnecessary to vindicate the supreme authority of federal law and contravenes the principles of federalism underlying the Eleventh Amendment." *Benning v. Board of Regents of Regency Univs.*, 928 F.2d 775, 778 (7th Cir. 1991) *(citing Pennhurst*, 465 U.S. at 89).

> (1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State . . . .

Benning, 928 F.2d at 779; *Management Assoc. of Illinois. Inc. v. Board of Regents of Northern Illinois Univ.*, 618 N.E.2d 694, 699 (Ill. App. Ct. 1993); *Robb v. Sutton*, 498 N.E.2d 267, 272 (Ill. App. Ct. 1986).

Plaintiffs contend that their allegations concern the individual Defendants' illegal actions performed outside the scope of their official authority. Illinois allows such a claim to proceed. *See Robb*, 498 N.E.2d at 270 ("[W]here a State officer acts illegally, or purports to act in excess of his delegated authority, a suit may be maintained against the officer individually, and is not an action against the State."). However, Plaintiffs may not seek a judgment against these individuals if it could "operate to control the action of the State or subject it to liability." *Management Assoc. of Illinois*, 618 N.E.2d at 699 (*quoting Robb*, 498 N.E.2d at 271). This inquiry turns largely upon whether the state is obligated to indemnify these individuals (in which case the claim would be barred) or whether the state merely volunteers to indemnify them (in which case the suit could proceed). *See Benning*, 928 F.2d at 778-79.[6]

---

[6] *But see Robb*, 478 N.E.2d at 271 ("If an action instead seeks compensation for past harm and monetary damages as a present claim for

(continued...)

Counts VIII and IX of Plaintiffs' Second Amended Complaint allege violations of the Illinois Constitution and common law torts, both of which require an illegal intent in order to state a claim. Thus, Plaintiffs have adequately alleged that the individual Defendants were acting in an illegal manner outside the scope of their official capacities and they are not prevented by Illinois immunity principles from suing these persons in their individual capacities.

Based on application of the Eleventh Amendment only, Plaintiffs would be able to proceed against: (1) all Defendants on the Title IX and Title VI claims; (2) only the individual Defendants in their individual capacities and for prospective injunctive relief in their official capacities on the section 1983 claims; and (3) only the individual Defendants in their individual capacities on the pendent state law claims. Of course, the resolution of the other arguments by the parties eliminates most of the remainder of Plaintiffs' Second Amended Complaint, as discussed below.

Title IX--Counts I & VII

In Count I, Plaintiffs, Second Amended Complaint names as Defendants Illinois State University, the Board of Regents, members of the Board in their individual and official capacities, and certain University officials in their

---

[6](...continued)
relief, that claim has the *potential* to control the action of the state or subject it to liability, and must be brought in the Court of Claims.") (emphasis added). The Illinois appellate court's more recent opinion in *Management Assoc. of Illinois* does not go this far and instead appears to require that the action actually control the state or subject it to liability, in accord with the Seventh Circuit's holding in *Benning*. 618 N.E.2d at 699-700 (and cases cited therein).

individual and official capacities. The magistrate judge held that:

> (1) There is no individual liability under Title IX;
>
> (2) Determination of whether the University met the requirements of the substantial proportionality "safe harbor" is a question of fact, not law, which cannot be decided on a motion to dismiss; and
>
> (3) Plaintiffs should be given leave to replead Count I against the University and Board of Regents only.

In Count VII, Plaintiffs' Second Amended Complaint names as Defendants certain individuals in their individual and official capacities, namely, Defendants Bordner, Herman, and Hutchison. Count VII is a claim alleging a violation of Title IX based on the individual Defendants, alleged sexual harassment and "officially sanctioned" assault upon Plaintiff Harper. The magistrate judge held simply that "the allegations in this complaint are sufficient to plead a Title IX violation and the motion on this issue must be denied."

The Court adopts the magistrate judge's recommendation to deny Defendants' motion to dismiss Count I against the University and Board of Regents, but to dismiss Count I against the individual Defendants in their

individual and official capacities.[7] The Court, however, rejects the magistrate judge's finding that Count I needs to be repled. There is no need for Plaintiffs to replead Count I against the University and the Board of Regents only, since dismissal of the individual Defendants achieves the same result. With respect to Count VII, the Court rejects the magistrate judge's recommendation to deny Defendants' motion to dismiss and finds, instead, that Count VII as pled against individual Defendants only must be dismissed with prejudice.

Plaintiffs' have conceded in their objections to the recommendation that Title IX does not provide a private right of action against individuals, and the case law supports that conclusion. *See Bustos v. Illinois Inst. of Cosmetology, Inc.*, 1994 WL 710830, at *2 (N.D. Ill. 1994) ("the goal of Title IX is to prevent institutional discrimination; consequently, the implied right of action created by Title IX extends only to institutional actors"); *Slaughter v. Waubonsee Comm. College*, 1994 WL 663596, at 2 (N.D. Ill. 1994) ("an action for individual liability cannot be brought pursuant to Title IX"); *Doe v. Petaluma City School Dist.*, 830 F. Supp. 1560, 1577 (N.D. Cal. 1993) ("individuals may not be held personally liable under Title IX"). In *Doe*, the district court reasoned that the Ninth Circuit's decisions in the Title VII context, which have held that individuals may not be held liable for violations under that Act or the Age Discrimination in Employment

---

[7] The Court notes, however, that the magistrate judge did not make clear in his Report and Recommendation that Title IX does not permit a private right of action against individuals in their individual and official capacities; however, based on the case law discussed herein, it appears certain that Title IX does not permit suit against individuals in either capacity, but rather allows a plaintiff to name only the educational institutions as defendants.

Act, were "so intimately related to Title IX[]" with respect to both "their history and the evils they attack" that "it would make little sense to interpret Title IX to permit individual liability absent clear direction from Congress." *Id. See also Bougher v. Univ. Of Pittsburg*, 713 F. Supp. 139, 146 (W.D. Pa.) ("A statute, such as Title IX, which contains its own remedies and is implemented through its own procedural scheme, does not permit bypassing what Congress has written by going directly to Section 1983.) *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989); *Mabry v. State Bd. for Community College & Occup. Educ.*, 597 F. Supp. 1235, 1239 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir.), cert. denied, 484 U.S. 849 (1987) (same). *But see Mennone v. Gordon*, 889 F. Supp. 53, 57 (D. Conn. 1995) (not following *Doe*); *Mann v. University of Cincinnati*, 864 F. Supp. 44, 47 (S.D. Ohio 1994) (finding that Title IX permits suit against individuals); *Nichole M. v. Martinez Unified School Dist.*, 964 F. Supp. 1369, 1381 (N.D. Cal. 1997) (Title IX does not preclude plaintiff from bringing a § 1983 claim against an individual in her individual capacity to enforce rights under Title IX).

The *Doe* court's reasoning seems sound to us, especially in light of the Seventh Circuit decisions which also hold that there is no individual liability under Title VII, *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995), or the Americans With Disabilities Act ("ADA"), *E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F. 3d 1276 (7th Cir. 1995) (noting that the same analysis would apply in Title VII and ADEA cases), and the recent decision in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996). Moreover, in *Waid*, the Court, deciding a different issue, nonetheless found that Congress intended Title IX to place the burden of civil rights law "on the

constitutional institutions themselves, not on the individual officials associated with those institutions." *Id.* at 863. Based on these decisions and Plaintiffs' concession of the issue, this Court finds that Title IX does not permit a private right of action against individuals.[8] The portion of Count I naming individual actors is, therefore, dismissed with prejudice. Count VII, which names only individual Defendants, is also dismissed in its entirety with prejudice.[9]

Count I, however, is not dismissed as to the University and the Board of Regents. As institutional actors, they are responsible under the Act for reducing or eliminating civil rights violations under Title IX. *See Waid*, 91 F.3d at 863; *Bustos*, 1994 WL 710830, at * 2; *Slaughter*, 1994 WL 663596, at * 2. Moreover, the magistrate judge correctly concluded that the issue of whether an educational institution's actions and decisions to eliminate teams in an attempt to reach "substantial proportionality" between the composition of the student body and the athletic program, and thereby to comply with Title IX, in fact falls

---

[8] The issue of qualified immunity, raised by Defendants, therefore, need not be addressed.

[9] Although the magistrate judge recommended that the Court allow Plaintiffs to replead Count VII against the University and the Board of Regents, this Court does not believe that another amendment to the Complaint, after three previous attempts, is warranted. Count VII, as pled in the Second Amended Complaint, is insufficient to state a cause of action under Title IX. Moreover, in their objections, Plaintiffs even concede that there is no individual liability under Title IX for purposes of Count I, but then remain silent with respect to the effects of this legal rule on Count VII. Based on these facts, this Court finds no basis for allowing Plaintiffs to replead Count VII, and in our discretion over such matters, finds that Count VII should, therefore, be dismissed with prejudice.

within the substantial proportionality "safe harbor" is, indeed, a question of fact, not of law. *See Cohen v. Brown University*, 101 F.3d 155, 171 (1st Cir. 1996) (the substantial proportionality test . . . is applied under the Title IX framework, not mechanically, but case-by-case, in a fact-specific manner"). *See also Kelly v. University of Illinois*, 832 F. Supp. 237 (C.D. Ill. 1993) (trial court held evidentiary hearing to determine whether substantial proportionality test had been met); *Cohen v. Brown University*, 879 F. Supp. 185 (D.R.I. 1995) (district court made substantial proportionality finding after full trial on the merits). Based on these cases, the Court denies Defendants' motion to dismiss Count I against the University and the Board of Regents. The Court, however, does not believe, as apparently the magistrate judge does, that Count I needs to be repled. The Court's decision to dismiss the individually named Defendants from Count I is sufficient to take care of the matter.

Section 1983 Claims--Counts II, III, V and X

In Counts II, III, V and X, Plaintiffs' Second Amended Complaint alleges various causes of action under 42 U.S.C. § 1983 against the University, the Board of Regents, and several University administrators in their individual and official capacities. As noted in this Court's Eleventh Amendment analysis, the § 1983 claims against the University, Board of Regents, and individual Defendants in their official capacity (except with respect to prospective injunctive relief in the latter case) are barred by the Eleventh Amendment and have been dismissed. This section of the opinion, therefore, deals only with the portions of Counts II, III, V, and X that remain against the individual Defendants in their individual capacity and any claims for prospective injunctive relief against those

individuals in their official capacities.

With respect to these claims, the magistrate judge found:

> (1) "[B]oth § 1983 and Title IX prohibit the same kinds of conduct and provide for the same types of remedies," under *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996); and
>
> (2) "[W]hen remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Section 1983." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981) ("Sea Clammers" doctrine); and
>
> (3) When the "Sea Clammers" doctrine, as adopted and applied in *Waid*, is applied to cases, like this one, where the Plaintiffs assert both Title IX and § 1983 claims, the § 1983 claims are "merged" into the Title IX claims and must therefore be dismissed; but
>
> (4) "Count X, which is based on the First Amendment, is not affected by this argument."

The Court adopts the magistrate judge's recommendations. We believe, as the magistrate judge found (without explanation) that Count X, although a § 1983 claim, is

not subsumed by Title IX because the facts upon which the First Amendment cause of action is based involve more than the mere act or decision to eliminate the men's wrestling and soccer teams. Rather, the First Amendment § 1983 claim also involves the exercise of speech, through demonstration and picketing. It is this right, the right to speak out in protest against the alleged Title IX violation, which Plaintiffs, seek to protect by asserting a First Amendment claim under § 1983. Although the remedies may be the same under both § 1983 and Title IX, the rights Plaintiffs seek to vindicate, here, are not. Close review of *Waid*, the "Sea Clammers" doctrine and the existing case law on this issue confirms our view that Title IX is only intended to preempt § 1983 claims that arise from facts that fall within the parameters of Title IX. The "Sea Clammers" doctrine

> speaks only to whether federal statutory rights can be enforced both through the statute itself *and* through section 1983[; it does not] stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim.

453 U.S. at 723 (emphasis in original). *See also Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996).

In *Waid*, the Seventh Circuit held:

> . . . a plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and § 1983. In particular, a plaintiff may not claim that an instance of

> intentional discrimination simultaneously creates causes of action under Title IX and under § 1983 and the Equal Protection Clause of the Fourteenth Amendment; the availability of a Title IX claim *precludes the pursuit of a § 1983 claim.*

91 F.3d at 862 (emphasis added). The basis for precluding § 1983 claims where a Title VII claim has been raised, as well, is based on the Seventh Circuit's finding that Title IX and § 1983 "prohibit the same kind of conduct (intentional discrimination) and provide compensatory and punitive damages as remedies for that conduct." This kind of overlap, noted the Court of Appeals, has been found "intolerable" by the U.S. Supreme Court. *See Middlesex Cty. Salvage Auth. V. National Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S. Ct. 2615, 2626 (1981) ("[w]hen remedial devices provided in a particular [a]ct are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under § 1983) ("Sea Clammers" doctrine). *See also*, *Williams v. School District of Bethlehem*, 998 F.2d 168, 176 (3d Cir. 1993) (Title IX action precludes constitutional claims); *Nelson v. University of Maine System*, 914 F. Supp. 643, 647-48 (D. Maine 1996) ("Title IX establishes a comprehensive scheme" that "precludes § 1983 claims, and by extension constitutional claims."); *Mann v. University of Cincinnati*, 864 F. Supp. 44, 48 (S.D. Ohio 1994) (same); *Mennone v. Gordon*, 889 F. Supp 53 (D. Conn. 1995) (same). The *Mann*, *Mennone*, *Williams*, and *Seamons* cases all involved Fourteenth Amendment equal protection claims. Thus, the reference to "constitutional claims" is tied to the Fourteenth Amendment. *Nelson* is the only case that goes further to preempt First Amendment claims. The Court declines to follow *Nelson*.

In *Waid*, the Seventh Circuit did not specifically say that all constitutional claims are subsumed by Title IX, rather, that case only addressed whether Fourteenth Amendment violations, which include equal protection issues also addressed by Title IX, were preempted. *Waid* found that Fourteenth Amendment Equal Protection claims were subsumed by Title IX, but did not find further. This court declines to extend *Waid* to "all constitutional claims" brought under 1983, because to do so would essentially foreclose all § 1983 constitutional suits against individuals in their individual capacities if a Title IX claim is raised. We do not believe that either the "Sea Clammers" doctrine or *Waid* intended to go that far. Rather, the *Waid* court merely stated: "Title IX gives plaintiffs access to the full panoply of judicial remedies. The provision of these remedies suggests that Congress saw Title IX as the device for redressing *any grievance* arising from a violation of federal civil rights by an educational institution." 91 F.3d at 862-63 (emphasis added). Based on these observations, this Court concludes that the Seventh Circuit's decision in *Waid* supports the conclusion that only constitutional claims asserted that arise from the same set of facts underlying the Title IX claim, whether brought as § 1983 claims or otherwise, are preempted by Title IX.[10] Therefore, the

---

[10] The one district court case to the contrary is not persuasive. In *Nelson v. University of Maine System*, 914 F. Supp. 643 (D. Maine 1996), the district court found that First Amendment claims, just like any other constitutional claims brought under § 1983, are subsumed and preempted by Title IX, if the facts that support these claims "aris[e] from a violation of federal civil rights by an educational institution." The *Nelson* court then found that even if the First Amendment addresses a separate harm than Title IX, the "Sea Clammers" doctrine "does not generally distinguish among constitutional injuries . . . [r]ather[,] if the statutory scheme at issue redresses the injuries

(continued...)

First Amendment § 1983 claim alleged in Count X survives Defendants' motion to dismiss.

Section 1985 Conspiracy Claim -- Count VI

In Count VI of the Second Amended Complaint, Plaintiffs allege that four university employees, "engaged in a conspiracy to deprive the Plaintiffs and members of the class they represent of their civil rights as guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States in violation of 42 U.S.C. § 1983." S.Am. Cmpt. Para. 78. In particular, Plaintiffs claim that these conspirators led the way to the decision to eliminate the men's wrestling and soccer programs and did so knowing and with the intent that the elimination of the programs would reduce minority participation. The magistrate judge held that Defendants' motion to dismiss Count VI should be denied because Plaintiffs' allegations present factual issues regarding the extent of the conspirators' knowledge and actions that are not appropriately decided by a Rule 12 motion. This Court rejects the magistrate judge's recommendation for the following reasons.

The issue before this Court is whether Title IX, which under *Waid* precludes all § 1983 actions related to discrimination by educational institutions and its officials, also precludes § 1985 actions, as well. This Court believes

---

[10](...continued)
claimed, it precludes the constitutional claims." *Id.* at 648. We disagree. Speech is a different right than the right to equal treatment based on gender, regardless whether the same remedies apply. We, therefore, reject *Nelson* and find that Plaintiffs' First Amendment claim is not preempted by Title IX.

that it does. First, a constitutional claim alleging violation by conspiracy, and thus under § 1985, is not materially different than a constitutional claim under § 1983, for purposes of a Title IX analysis. If the facts underlying the § 1985 and the Title IX claims are the same, then Title IX presumably preempts the § 1985 claims because the remedial scheme for both is the same.[11] Second, the § 1985 claim is framed in terms of a conspiracy by *individual* defendants. The justification for precluding constitutional claims against individuals under § 1983, when the facts arise in the context of a Title IX suit, applies with equal force to § 1985 claims. Title IX seeks to remedy federal civil rights violations by educational institutions, rather than by individuals employed by those institutions, and does not permit a private right of action against individual defendants. When Title IX and § 1983 claims overlap, § 1983 claims are preempted, and there is no cause of action against individual actors for claims arising from facts covered by Title IX. This court cannot conceive of a distinction between § 1983 and § 1985 which would justify a departure from this rule in the § 1985 context. In fact, *Waid* itself seems to suggest that Title IX precludes § 1985 suits as well as § 1983 suits. *See Waid*, 91 F.3d at 861 (noting that the Supreme Court's decision in *Great American Fed Sav. & Loan v. Novotny*, 442 U.S 366 (1979) held that Title VII preempts a cause of action for employment discrimination under § 1985). We believe that both the spirit and the letter of *Waid* require us to dismiss Plaintiffs' § 1985 claim as preempted, by their Title IX claim. The Court, therefore, rejects the magistrate judge's

---

[11] Title IX provides for nominal, compensatory, emotional distress, and punitive damages, as well as equitable relief and attorneys fees. 20 U.S.C. § 1681 *et seq*, Section 1985 provides the same remedies. 42 U.S.C. § 1985 *et seq*.

recommendation with respect to Count VI and dismisses Count VI with prejudice.

Title VI -- Count IV

Having resolved Title IX, and all claims precluded by the Title IX claim, the next issue is Title VI. Title VI, like Title IX, does not provide a private right of action against individual defendants. *See Bustos v. Illinois Inst. of Cosmetology, Inc.*, 1994 WL 710830, at * 3 (N.D. Ill. 1994) (no cases were found that permit Title VI claims against individuals and the Supreme Court in *Cannon* emphasized that the goal of Title IX, like its model Title VI, is to prevent institutional not individual discrimination); *Clemes v. Del Norte County Unified School District*, 1994 WL 317546, at * 3 (N.D. Cal. 1994) (both Title VI and Title IX provide an implied right of action against the entities receiving federal funds, but do not authorize suit against individuals).

This Court believes that Title IX precludes suits against individual defendants, both in their individual and official capacities, since: (1) the Eleventh Amendment does not bar suits against state educational institutions under Title VI or Title IX; (2) the plain language of Title VI and IX appears to authorize suits only against educational institutions; (3) the Seventh Circuit's language in *Waid* appears to support the conclusion that Title IX is directed only to educational institutions, rather than individuals, and (4) "while the liability provisions of Title VII and the ADEA are not identical to the provisions in Title VI and IX, they are the same in that they target the offending employer or institution, rather than individuals within that entity. Moreover, all four statutes are directed to similar wrongdoing and share analogous legislative

histories." *Clemes*, 1994 WL 317546, at * 3. Given these similarities, there is no reason why Title VI would authorize individual liability, while Title VII, Title IX, the ADA, and the ADEA do not.

For these reasons, the Court rejects the magistrate judge's recommendation that Defendants' motion to dismiss Count IV, alleging claims of racial discrimination under Title VI against the individual Defendants, be denied. Instead, as just discussed, the Court finds that Title VI does not authorize suits against individual defendants. Since the Eleventh Amendment does not provide immunity for the University and the Board of Regents, this leaves only the portion of Count IV alleging a Title VI violation against the University and Board of Regents alive.[12]

Equal Protection Clause of the Illinois Constitution--Count VIII

As the Court's analysis of the Eleventh Amendment issues indicates, the state law claims that remain remain only against the individual Defendants, because these Defendants allegedly acted outside the scope of their authority. The Equal Protection claim asserted under the

---

[12] For clarification, the Court notes that the magistrate judge found that "Plaintiffs, theory [in Count IV] is that elimination of the wrestling and soccer programs had a disproportionate impact on *black male athletes*." Report and Recommendation at 23 (emphasis added). A closer review of the Second Amended Complaint, however, reveals that, although Plaintiffs do allege that 7 of the 10 minorities on the men's wrestling team were black, the Plaintiffs' theory is not solely that black male athletes were disproportionally impacted by elimination of the men's wrestling and soccer teams, but that Hispanic and Asian males, who are generally smaller in physical size, were also impacted. S.Am. Cmpt. Para. 67.

Illinois Constitution in Count VIII is no exception. The Court notes, however, that to allow this claim against the individual Defendants would permit an end-around *Waid* and its application of the "Sea Clammers" doctrine to the Title IX claim asserted in this case. The magistrate judge held that Defendants' Motion to Dismiss Count VIII should be denied, because: (1) he concluded that the federal equal protection claim should survive; and (2) since the Illinois Constitution can "provide more but not less protection" than the federal Constitution, the Illinois Constitutional claim should survive too. This reasoning is erroneous. As the Court explained earlier, the federal equal protection gender, race, and sex harassment/assault claims in Counts II, V, and VII must be dismissed. Counts II and V are dismissed as § 1983 claims which have been preempted by Title IX--a principle that the magistrate judge, himself, recognized; and Count VII has been dismissed because it is a Title IX claim alleged only against individual defendants and Title IX does not permit individual liability. The Supremacy Clause, U.S. Const. Art. VI, cl. 2, as Defendants correctly point out, is the central issue with respect to Count VIII.

The Seventh Circuit recently outlined the relevant considerations to determine whether federal law preempts state law under the Supremacy Clause in *Garcia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997). In *Garcia*, the Court wrote:

> The Supremacy Clause of the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. Art. VI, cl. 2. Pursuant to

the Supremacy Clause, Congress has the authority to preempt state law. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986); *Time Warner Cable v. Doyle,* 66 F.3d 867, 874 (7th Cir. 1995), *cert. denied,*__ U.S. __, 116 S. Ct. 974 (1996). In determining whether the Congress has preempted state law, our task is to discern congressional intent. *Time Warner Cable,* 66 F.3d at 874 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 831-82, 112 S. Ct. 2031, 2036 (1992). A Court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663-64, 113 S. Ct. 1732, 1737 (1993). Therefore, preemption will be found only in those situations where it is "the clear and manifest purpose of Congress." *Id.* At 664, 113 S. Ct. at 1337 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)). Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption). *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 2275 (1990); *American Agriculture Movement, Inc. V. Board of Trade of Chicago,*

977 F.2d 1147, 1154 (7th Cir. 1992).

Id. at 294.

In this case, allowing Plaintiffs' Equal Protection claim under the Illinois Constitution to survive against the individual Defendants would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in Title IX. *See Maryland v. Louisiana*, 451 U.S. 725, 746-47, 101 S.Ct. 2114, 2128-29 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941)). In *Waid*, the Seventh Circuit, in the federal context, has already indicated that Title IX preempts the entire field of federal civil rights violations related to discrimination by educational institutions. Because Title IX does not contain an express preemption clause, the issue before the Court is whether Title IX preempts state constitutional claim under the "field" and/or "conflict" preemption doctrines. The Supremacy Clause, itself, provides that the laws of the United States shall be supreme "any Thing in the Constitution. . . of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, state constitutional claims, such as the one before this Court, may in fact be preempted by federal laws that occupy the field or conflict in some way. This Court believes that Title IX does both. Not only has the Seventh Circuit found that Title IX provides the exclusive remedy for federal civil rights violations against educational institutions, but Title IX also prohibits individual liability for those violations, whereas the Illinois Constitution and its Equal Protection Clause do not.

Moreover, Title IX preempts all constitutional claims, particularly equal protection claims, that arise out of the same facts which form the basis for a Title IX claim

against an educational instituion. *Waid*, 91 F.3d at 863. Although the *Waid* court was dealing with federal constitutional claims, the Court did not distinguish between federal and state constitutional claims for the purpose of holding that Title IX occupies the field and therefore preempts all other claims arising within its parameters. We, therefore, believe that the Seventh Circuit would find that plaintiffs are not permitted to raise equal protection challenges under the Illinois Constitution together with Title IX claims. To permit such a pleading would, in fact, provide an end-around the "intolerable" situation that the Supreme Court identified in *Sea Clammers*. Although the Court has not been able to find a case directly on point, we do believe that the Supremacy Clause cases, together with *Waid*, provide a sufficient basis upon which to dismiss Count VIII with prejudice.

Illinois Common Law Claims -- Count IX

Based on the Court's Eleventh Amendment analysis, the only common law claims that survive, if at all, are those pled against the individual Defendants who allegedly exceeded the scope of their authority. No one has argued, and the Court does not find, that *Waid* applies here; thus, this issue is simply whether Count IX, as pled, alleges sufficient facts to state a cause of action under the common law theories alleged, namely, promissory estoppel; fraudulent inducement; negligent misrepresentation; and intentional infliction of emotional distress. The magistrate judge found as follows:

> (1) The Eleventh Amendment bars Count IX; however, if does not, the following recommendations are made:

(2) With respect to promissory estoppel, only those plaintiffs in the class certified by the district court who were already members of the two eliminated teams can sue for relief under this theory; prospective students eligible for scholarship but not yet parties to any commitment from ISU to provide scholarships who had not accepted such an offer, at best received an offer withdrawn before acceptance; such an offer cannot be unambiguous, nor can reliance thereon be deemed reasonable. Consequently, Count IX would need to be repled if it survives.

(3) With respect to the fraudulent inducement claim, the alleged misrepresentation, if proven, was an affirmative representation of the program's viability that was, again if proven, false at the time it was made, and Count IX would survive on that ground. Moreover, Rule 9 only requires "slightly more" detail for claims of fraudulent inducement, and the complaint meets that requirement by alleging the content of the misrepresentation, the general time frame during which it was made, and who made it;

(4) With respect to the negligent misrepresentation claim, Count IX cannot survive the Defendants' Motion to Dismiss, because state law reveals that this tort is limited to those whose business "is centered upon the provision of information." Because the Defendants in this case do not meet that re-

quirement, the negligent misrepresentation claim must be dismissed;

(5) With respect to the intentional infliction of emotional distress claim, Plaintiffs have pled sufficient facts to support the "extreme and outrageous behavior" element of this tort, and thus the claim survives Defendants' Motion to Dismiss.

The Court has already rejected the magistrate judge's recommendation to bar on Eleventh Amendment grounds the common law claims asserted in Count IX against the individual Defendants. The Court, does, however, adopt the magistrate judge's recommendations with respect to the promissory estoppel, fraudulent inducement, and negligent misrepresentation claims, for the reasons stated in the magistrate judge's Report and Recommendation. The Court rejects the magistrate judge's recommendation with respect to the intentional infliction of emotional distress claim, because the allegations in the Complaint are not sufficient to satisfy the "extreme" and "outrageous" conduct requirement under Illinois law. See *Adams v. Sussman & Hertzberg, Ltd.*, 1997 WL 527938 (1st Dist. 1997). As the *Adams* court recognized:

> Extreme and outrageous conduct sufficient to create liability for intentional infliction of emotional distress is defined as conduct that exceeds all bounds of decency and that is regarded as intolerable in a civilized community. *Public Finance Corp. V. Davis*, 66 Ill.2d 85, 360 N.E.2d 765 (1976); *Khan v. American Airlines*, 266 Ill. App. 3d 726, 639 N.E.2d 210 (1994). The tort does not

> extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *McGrath v. Fahey*, 126 Ill.2d 78, 533 N.E.2d 806 (1988) . . .; and the infliction of such emotional distress as fright, horror, grief, shame, humiliation and worry is not sufficient to give rise to a cause of action. The emotional distress required to support the cause of action must be so severe that no reasonable person could be expected to endure it. *Public Finance Corp.*, 66 Ill.2d 85, 360 N.E.2d 765. The intensity and the duration of the distress are factors to be considered in determining its severity.

Adams, 1997 WL 527938, at * 5.

Here, Plaintiffs, allegations of disappointment and loss of opportunity related to the elimination of the men's wrestling and soccer teams do not constitute the type of extreme and outrageous conduct outlined above. This Court, bound by Illinois law with respect to the pendent state law claims, therefore dismisses with prejudice the portion of Count IX alleging a claim for intentional infliction of emotional distress. The Court also dismisses with prejudice the portion of Count IX alleging a claim for negligent misrepresentation for the reasons given by the magistrate judge in his Report and Recommendation.

Rights of Female Players -- Count XI

In Count XI, Plaintiffs allege that Kerrie Ann Bracken and Shannon Duffy have been injured by the elimination of men's athletic teams to achieve proportion-

ality rather than the addition of three more women's teams, specifically a women's Rugby team, over the next few years. The magistrate judge held that Plaintiffs should have the "opportunity to develop their case", on this issue because the Defendants have not met their "burden of persuasion." After reviewing the Second Amended Complaint, Defendants' motion to dismiss, and the objections to the magistrate's recommendation, it is this Court's view that Count XI should be dismissed with prejudice.

The Court agrees with Defendant that the two named Plaintiffs lack standing to bring a claim for failing to add a women's Rugby team to the ISU athletic roster under Title IX. Title IX does not require ISU to add women' s teams, in particular Rugby teams; it merely requires "equal opportunity" for both male and female athletes who are students. Consequently, the Court will dismiss Count XI with prejudice.

CONCLUSION

To sum up: the Eleventh Amendment bars all § 1983 and Illinois common law claims against the University and the Board of Regents. The Court's findings with respect to the other allegations and Defendants are summarized below:

> (a) Count I survives as to the institutional Defendants -- ISU and the Board of Regents; Title IX does not provide a private right of action against individuals, so those Defendants are dismissed with prejudice. The Eleventh Amendment, however, is not a bar.

(b) Counts II, III, and V are dismissed with prejudice against the remaining individual Defendants in both their individual and official capacities, because, as § 1983 claims, they are subsumed and preempted by the Title IX claim in Count I by the "Sea Clammers" doctrine, as applied in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996). The Court, therefore, need not reach the issue of qualified immunity as to Counts II, III, and V.

(c) Count X, alleging a First Amendment § 1983 claim, survives dismissal because it is not preempted by Title IX. The First Amendment claim remains, however, only with respect to claims for prospective injunctive relief, which can be brought against the individual Defendants in their official capacities.

(d) Count VI, alleging a conspiracy among individual Defendants under § 1985, is also dismissed with prejudice. The "Sea Clammers" doctrine applies with equal force to § 1983 claims and § 1985 claims. Moreover, Count VI, as pled, is alleged against individuals only. Title IX preempts § 1985 claims against individuals, just as it preempts § 1983 claims against individuals.

(e) Count IV, alleging a violation of Title VI survives against the University and the Board of Regents, as does Title IX; however, it is dismissed as to the individual

Defendants because Title VI, like Title IX, does not provide a private right of action against individual defendants.

(f) Count VII alleges a claim of sexual harassment and assault under Title IX against individual Defendants. Plaintiff concedes and the case law supports the finding that there is no individual liability under Title IX. Count VII, therefore, as plead, is insufficient to state a claim. The Court dismisses Count VII with prejudice because the Plaintiffs have already had three chances to state a claim and failed each time.

(g) Count VIII, alleging a violation of the Illinois Equal Protection Clause is dismissed with prejudice. Title IX preempts all constitutional claims--state or federal--arising on the same facts; and, the Supremacy Clause of the U.S. Constitution requires preemption of state law where federal law occupies the field, as Title IX does.

(h) Count IX, alleging various common law theories against the remaining individual Defendants is dismissed in part. Plaintiffs' common law theories of promissory estoppel and fraudulent inducement survive Defendants' motion to dismiss. Plaintiffs' theories of negligent misrepresentation and intentional infliction of emotional distress, however, fail to state a claim and are dismissed with prejudice.

(i) Count XI, alleging (presumably) a Title IX violation against the University and Board of Regents and the individually named Defendants, is dismissed with prejudice for lack of standing.

Based on these findings, the Court GRANTS Defendants' Motion to Dismiss WITH PREJUDICE the individual Defendants with respect to Counts I, II, III, IV, V, VI, VII, VIII, and XI, and the part of Count IX alleging claims of negligent misrepresentation and intentional infliction of emotional distress (#67-1). As alleged in the Second Amended Complaint, the individual Defendants named by Plaintiffs who are now dismissed are:

Counts I-III

Greenspan, Herman, Taylor, Wallace, Brown, Grimm, Johnson, Matthews, Memken, Newgren, Verner, Otto, Amdor, Mercer, Bartowiak, Niemi, Ward, Spaniak, Vasquez, Djerf, Reeter, Tolone, Ebbesen,Kasten, Masterson, McKenzie, Myles, Scheibling, Shah, Siegel, Sulaski, Winter, Fowler, McGrew, Mersinger.

Count IV

The same defendants named in counts I-III, plus Jill Hutchison.

Count V

The same defendants named in Count IV.

Count VI

Wallace, Greenspan, Hutchison, Herman.

Count VII

Bordner, Herman

Count VIII

The same defendants named in Counts I-III, plus Jill Hutchison.

Count IX

Wallace, Greenspan, Herman, Taylor.

Count XI

The same defendants named in Counts I-III.

The Court further GRANTS Defendants' Motion to Dismiss WITH PREJUDICE the individual defendant, Jill Hutchison, in her individual capacity with respect to Count X, but DENIES Defendants' Motion to Dismiss the individual defendant in her official capacity with respect to claims for prospective injunctive relief only. (#67-1.). Finally, the Court GRANTS Defendants' Motion to Dismiss WITH PREJUDICE the University and Board of Regents on Counts II, III, V, VIII, IX, X, and XI. (# 67-1). The Court's rulings on Defendants' Motion to Dismiss means that the Magistrate Judge's Report and Recommendation (#94-1) is GRANTED in part and DENIED in part.

All that remains in this case now is: (1) the Title IX claim alleged in Count I against the University and

Board of Regents; (2) the Title VI claim alleged in Count IV against the University and Board of Regents; (3) the First Amendment § 1983 claim alleged in Count X against the individual defendant, Jill Hutchison, in her official capacity for prospective injunctive relief only; and (4) the pendent state law claims alleged against the individual Defendants in Count IX, with the exception of the negligent misrepresentation and intentional infliction of emotional distress claims.

Although the Court could end this order here, several observations are in order before this case proceeds much farther. It is apparent from the pleadings that both parties stand to lose in this case. The institutional Defendants may be able to escape liability under Title VI and IX based on the absence of any evidence by Plaintiffs that their decisions were made outside the parameters of those statutes. Plaintiffs may be able to prove their pendant state law claims, the heart of which seem to be that Defendants made certain representations to them concerning recruitment and scholarships but then reneged on those promises by eliminating the men's wrestling and soccer teams without adequate warning. Lurking in the background is the absence of any law compelling an educational institution to continue any particular sport or preventing it from eliminating a sports team where the students participating on those teams have been recruited, are on scholarship, or hope to be some day. In fact, the elimination of men's athletic teams, if done to achieve substantial proportionality among men and women athletes, is protected under Title IX. Settlement negotiations, even at this relatively early stage in the discovery process, would, therefore, be advisable. This case is referred to the magistrate judge for further proceedings.

ENTERED this 6th day of October, 1997.

/s/
JOE BILLY McDADE
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

RITA HARPER, et al

Plaintiff

VS. Case No. 95-1371

BOARD OF REGENTS, ILLINOIS STATE UNIVERSITY, et al

Defendants **[Filed and Entered on June 12, 1997; C.D.Ill.]**

REPORT AND RECOMMENDATION

Now before the court is the Defendants' Motion to Dismiss Second Amended Complaint (#67). The motion is fully briefed, and pursuant to Local Rule 72.1, the district judge has referred the matter to me for a report and recommendation. After carefully considering all of the submissions of the parties, and pursuant to 28 U.S.C. §636(b)(1)(B), I recommend that the motion be granted in part and denied in part.

I. BACKGROUND

The plaintiffs[1] in this case are past, present, and

---

[1] Plaintiff Rita Harper's claims have been severed from the remaining claims, as her claims relate to alleged discrimination within in the women's basketball program. A class has been certified of the male students affected by changes to the school's athletic programs. Some (continued...)

prospective Illinois State University (ISU) students, for the most part men who were impacted by ISU's decision to eliminate men's intercollegiate soccer and wrestling teams at the end of the 1994-95 school year. The defendants are the University, the Board of Regents and its members, and several University officials.

The complaint consists of eleven counts seeking various combinations of injunctive and monetary relief for alleged sex and race discrimination in violation of various federal and state constitutional provisions and statutes. The defendants' motion attacks all eleven counts for numerous reasons.

II. DISCUSSION

A. Motions to Dismiss Generally

A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 (7th Cir. 1993). Rather, it should be construed broadly and liberally in conformity with the mandate in Rule 8(f).

For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff; its

---

[1](...continued)
of the plaintiffs are males alleging racial discrimination; no class was certified for these claims. Some of the plaintiffs are females alleging injury by ISU's decision to cut men's sports rather than expanding women's sports; no class was certified for these plaintiffs either. See Order dated Oct 11, 1996.

well-pleaded factual allegations are taken as true, and all reasonably-drawn inferences are drawn in favor of the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Hishon v. King*, 467 U.S. 69 (1984); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *MCM Partners v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 969 (7th Cir. 1995); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Yeksigean v. Nappi*, 900 F.2d 101 (7th Cir. 1990). In addition, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Sutliff Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984). If the plaintiffs claim as plead is "without legal consequence," dismissal is proper; *Grzan v. Charter Hospital*, 104 F.3d 116, 119 (7th Cir. 1997).

Rule 12 (b)(1) requires that an action be dismissed if the court lacks jurisdiction over the subject matter of the suit. *Montgomery Ward & Co. v. Warehouse, Mail Order, Office, Technical & Professional Employees Union, Local 743*, 911 F.Supp. 1094, 1099 (N.D.Ill. 1994). When ruling on a motion to dismiss based upon a claim of sovereign immunity or lack of subject matter jurisdiction, the court must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of plaintiff. *Ezekial v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995); *Rueth v. EPA.*, 13 F.3d 227, 229 (7th Cir. 1993).

In the absence of evidence raising a fact question as to jurisdiction, the Court's inquiry is limited. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1984). Although a factual dispute over jurisdiction should prompt the court to hold an evidentiary hearing and weigh conflicting evidence, *See*, *Bowyer v. U.S. Dep't of Air Force*, 875 F.2d 632, 635 (7th Cir. 1989), where the jurisdictional facts are

substantially simple and uncontroverted, as they are here, the court may rule on a 12(b)(1) motion without pausing to make findings on any disputed fact questions that may exist. *See, Commodities Export Co. v. U.S. Custom Serv.*, 888 F.2d 431, 436 (6th Cir. 1989).

B. The Eleventh Amendment

Defendants have challenged Counts I, II, III, IV, V, VII, VIII, IX, and X, arguing that Title IV, Title VI, and §1983 claims against the University and the Board of Regents are barred by Eleventh Amendment immunity. Plaintiff counters that Congress, in enacting the various statutes at issue in each of those counts, has validly abrogated that immunity.

1. Eleventh Amendment and abrogation generally

The Eleventh Amendment's proscription of suits against a State in federal court is a jurisdictional bar. *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *cert. denied*, __ U.S.__, 114 S.Ct. 2139, 128 L.Ed.2d 867 (1994). *Accord, Edelman v. Jordan*, 415 U.S. 651, 677 (1974); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996). *See also, Seminole Tribe of Florida v. Florida*, __ U.S.__, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)(the Court dismissed for lack of subject matter jurisdiction after finding immunity under the Eleventh Amendment);

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit

> in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

When written, the Eleventh Amendment was based on certain presuppositions that, over the course of time, have been interpreted by the Supreme Court as expanding the meaning of this Amendment beyond its literal terms. *Seminole Tribe*, 116 S.Ct. at 1122. Thus, the Eleventh Amendment means as a general rule that a State is immune from to suit in federal court.

The Amendment applies as well to agencies or entities that are arms or alter egos of the State, because under those circumstances the State is the real party in interest. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984); *Edelman*, 415 U.S. 615 at 662; *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-46 (1993); *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 400 (7th Cir. 1996).

While actions for monetary damages against State officials in their official capacity are barred by the Eleventh Amendment, *Quern v. Jordan*, 440 U.S. 332 (1979), actions for monetary damages against State employees in their individual capacity are not. *Kentucky v. Graham*, 473 U.S. 159 (1985).

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court created an important exception to immunity, holding that suits against State employees in their official capacities do not run afoul of the Eleventh Amendment if they seek prospective injunctive relief from threatened or continuing violations of the Constitution or federal law.

See also, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Booth v. Maryland*, No. 96-7597, 1997 WL 189821 (4th Cir. April 21, 1997); *Children's Healthcare Is A Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996); *Vickery v. Jones*, 100 F.3d 1334 (7th Cir. 1996); *In re SDDS, Inc.* 97 F.3d 1030 (8th Cir. 1996); *Natural Resources Defense Council v. California Dep't of Transportation*, 96 F.3d 420 (9th Cir. 1996). Compare *Green v. Mansour*, 474 U.S. 64 (1985)(declaratory relief against State official for past violations of federal law barred as impermissible "end run" around the Eleventh Amendment).

There are other exceptions. States may consent to federal jurisdiction (for example, by participating in a federally funded program that explicitly requires consent for participation) or may waive their immunity (by conduct or by State law). Congress may also abrogate the States' immunity where there is a clear statement of congressional intent to abrogate and a valid exercise of Congressional power.

It is abrogation that is at issue in this case, an issue to which the Supreme Court spoke less than one year ago in *Seminole Tribe*, 116 S. Ct. 1114. In that case, the Court articulated -- or clarified -- the two part test required for abrogation: Congress must have clearly expressed its intent to abrogate and must have validly exercised power under §5 of the Fourteenth Amendment.

The *Seminole Tribe* Court stated that Congress' intent to abrogate States' immunity must "be obvious from a clear legislative statement." *Id.* at 1123. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the

Eleventh Amendment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, (cited with approval in *Seminole Tribe*, 116 S.Ct. at 1123). The Court also reaffirmed *Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989) that evidence of intent to abrogate must be "unequivocal and textual." 116 S.Ct. at 1123.

As demonstrated by *Seminole Tribe*, however, the intent need not be explicit but rather may be inferred if the text and structure of the legislation make the intent clear. In finding such clear intent, the *Seminole Tribe* Court noted the statutory language vesting jurisdiction in the district courts over causes of action "arising from the failure of a State" to perform certain statutory duties. *Id.* at 1123-24. The statute set forth a remedial scheme that shifted the burden of proof to the State after the plaintiff met an initial burden of proof and that provided certain remedies for various findings that a court might make against a State defendant. According to the Court, "numerous references to the 'State' . . . make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit." *Id.* The Court apparently attached no importance to the fact that the Act did not explicitly use the words Eleventh Amendment, sovereign immunity or abrogation.

Before *Seminole Tribe*, the Supreme Court had held that Congress had constitutional authority to abrogate Eleventh Amendment immunity under §5 of the Fourteenth Amendment and under the Commerce Clause. In *Seminole Tribe*, the Court overruled its prior holding that the Commerce Clause provided such authority, finding that Article I powers could not be exerted to enlarge Article III jurisdiction. 116 S. Ct. at 1128. Thus, it is necessary to examine --and where courts have previously found legitimate

Commerce Clause power, to reexamine -- the specific authority exercised by Congress in enacting any particular legislation in order to determine whether the exercise was valid.

Since *Seminole Tribe*, federal courts across the country have been asked to assess subject matter jurisdiction in light of the immunity provided by the Eleventh Amendment and the limitations on that immunity. The Seventh Circuit has described the immunity as "expansive," *Gorka by Gorka v. Sullivan*, 82 F.3d 772, 774 (7th Cir. 1996) and parties have raised the issue in suits arising under statutes as varied as the Bankruptcy Code and the Americans with Disabilities Act.

In this case, the plaintiff has named as defendants Illinois State University, the Board of Regents, members of the Board of Regents in their individual and official capacities, and several University administrators in their individual and official capacities. The parties do not dispute that the University and the Board are arms of the State of Illinois and thus entitled to the immunities of the Eleventh Amendment. What is disputed is whether the statutes forming the foundation for the cause of action meet the "clear statement" test for abrogation and whether those statutes were enacted pursuant to §5 of the Fourteenth Amendment as *Seminole Tribe* mandates.

The federal statutes at issue are: Title IX, Title VI, and §1983. In addition, the Eleventh Amendment has been raised with respect to the state law claims in Counts VIII and IX. Each will be considered. *See. Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 337 (7th Cir. 1990) (federal court must examine each claim to see if court's jurisdiction is barred by the Eleventh Amendment).

2. Title IX and Title VI (Counts I, IV, VII and XI)

Defendants argue that, after *Seminole Tribe*, neither Title IX nor Title VI may be enforced against the State because the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. §2000d-7, was enacted not under the Fourteenth Amendment but under Congress' spending power. Moreover, according to defendants, the *Ex Parte Young* exception does not apply to the individual defendants because the two Acts contain adequate administrative remedies.

Plaintiffs respond that, while Congress' authority to pass these statutes derived in part from the spending power, that power was being used "as a vehicle to achieve the Fourteenth Amendment goal of ending discrimination" and thus Fourteenth Amendment powers were being used as well.

The appropriate question is whether Congress had the authority to adopt the legislation, not whether it correctly recited that authority in the legislation. *Woods v. Miller*, 333 U.S. 138 (1948); *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982). *Accord*, *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 839 (6th Cir. 1997); *Ramirez*, 715 F.2d 694. Where Congress has not recited the source of its power or has expressed reliance on a power other than the Fourteenth Amendment, courts should not "quickly attribute" to Congress an intent to do so. *Wyoming*, 460 U.S. at 243 n.18. *See also*, *Timmer*, 104 F.3d at 840.

In order to determine whether a statute was enacted to enforce the Fourteenth Amendment, and therefore pursuant to Congress' powers under §5 of that Amend-

ment, the Supreme Court has articulated a test: may the statute be regarded as an enactment to enforce the Fourteenth Amendment, and, if so, is it plainly adapted to that end and consistent with the letter and spirit of the Constitution? *Katzenbach v. Morgan*, 384 U.S. 641, 647 n.5 (1966). *See Wilson-Jones v. Caviness*, 99 F.3d 203, 208-9 (6th Cir. 1996)(applying Katzenbach factors to FLSA).

The Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7(a), provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of. . . Title IX of the Education Amendments of 1972, . . . title VI of the Civil Rights Act of 1964, or the provisions of **any other Federal statute prohibiting discrimination** by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (a), remedies . . . are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State. [emphasis added].

The statutes listed in § 2000d-7(a)(1) are all aimed at and described by Congress (see emphasized language above) as preventing discrimination in the expenditure of federal monies. Such statutes certainly meet the *Katzenbach* test. The amendment, likewise, simply expands the class of persons liable under those statutes to

include States. While certainly the spending power is implicated, it appears to me that the Fourteenth Amendment is even more necessarily involved as a basis for Congress' action in prohibiting discrimination of any kind. *See, Crawford v. Indiana Dept. Of Corr.*, No. 96C125, slip op. at 9-10 (7th Cir. June 2, 1997)(noting that discrimination other than racial is encompassed within the prohibitions of equal protection and therefore within Congress' Fourteenth Amendment §5 powers. *See also, Parents for Quality Educ. With Integration, Inc. v. Indiana*, 753 F.Supp. 733 (N.D.Ind. 1990), *aff'd* 977 F.2d 1207, *modified on other grounds on denial of rehearing* 986 F.2d 206; *Sharif by Salahuddin v. New York State Educ. Dep't.*, 709 F.Supp. 345 (S.D.N.Y. 1989).

I therefore believe that both Title IX and Title VI were enacted, in part, pursuant to Congress' Fourteenth Amendment powers and that therefore the expression of abrogation in §2000d-7 was a valid exercise of those same powers.

Defendants also rather perfunctorily argue that the individual defendants are also immune and do not fall within the *Ex Parte Young* exception. In light of the recommended finding that Congress has abrogated sovereign immunity, this argument cannot be sustained. If the State is not immune as the sovereign, then neither are the employees and agents of the state; without immunity, the individuals can be sued without reference to this exception.

As a result of these conclusions, I recommend denial of defendants' motion to dismiss the Title VI and Title IX claims in Counts I, IV, VII, and XI on the basis of the Eleventh Amendment.

3. Section 1983 (Counts II, III, V and X)

Defendants also contend that the claims brought pursuant to 42 U.S.C. §1983 are barred by the Eleventh Amendment, regardless of whether the defendants are the individuals or the entities, relying on *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Plaintiffs, in reliance on *Quern v. Jordan*, 440 U.S. 332 (1979), respond by pointing out the difference in the remedies being sought: a suit seeking to impose monetary liability that must be paid from the State's treasury, which is barred, as opposed to prospective injunctive relief (even if it will entail fiscal obligations) against the institution and its employees in their official capacity, which is not. Plaintiffs assert that, in the §1983 claims against the individuals in their official capacity, plaintiffs seek only prospective relief (reinstatement of athletic programs); it is in the individual capacity suits against the individual defendants that plaintiffs seek compensatory and other retroactive relief. These distinctions in the remedy sought defeat the Eleventh Amendment argument, according to Plaintiffs.

In *Quern v. Jordan*, 440 U.S. 33 (1979), the Supreme Court held that Congress did not, in enacting § 1983, abrogate Eleventh Amendment immunity of the States or of their political subdivisions. In *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989), the Court built on *Quern* to conclude that States and their subdivisions were not persons within the meaning of § 1983. The result of these two cases is that plaintiffs' § 1983 claims against the University and the Board of Regents are barred, both because these defendants are not "persons" liable under the statute and because the Eleventh Amendment provides immunity from suit in federal court.

The claims against the individual employees raise different questions. The claims against the individual employees in their **individual** capacities are not impacted in any way by the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159. Any relief appropriate under § 1983 may be obtained from such defendants.

However, those claims against the employees in their **official** capacities, which are identical to suits against the entities themselves, see, *Brandon v. Holt*, 469 U.S. 464 (1985), are barred for these same reasons as are the claims against the State entities, unless they fall within the exception articulated in *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny. To the extent that the claims against the individual defendants in their official capacities seek prospective injunctive relief from threatened or continuing violations of federal law, the Eleventh Amendment provides them with no immunity. On the other hand, retroactive injunctive relief remains unavailable because of the Eleventh Amendment. *Mansour*, 474 U.S. 64.

In Count II, plaintiffs have not identified with any specificity their targets; throughout, reference is simply made to "Defendants." For damages, plaintiffs seek:

> an Order enjoining Defendants from terminating the intercollegiate men's soccer and wrestling programs, for an Order mandating the restoration of those programs to the size, status, participation and funding levels that they enjoyed prior to their unlawful termination, for an Order declaring null and void the Defendants' actions in eliminating such programs, for an Order awarding Plaintiffs their attorneys fees and costs, and

> for such other and further injunctive and prospective relief as may be equitable and just.

Likewise in Count III, plaintiffs have not clearly identified their targeted defendants, generically referring to the conduct of the "Defendants." Helping somewhat is the allegation in this count of custom and policy, which indicates a suit against the institution or an official capacity suit. Plaintiffs pray for the same relief in Count III as in Count II.

It is in Count V that differences appear. Plaintiffs complain about the conduct of the defendants generally, but add that two of the individuals "specifically" are the focus. In seeking damages, the plaintiffs ask:

> for an Order enjoining Defendants from terminating the intercollegiate men's soccer and wrestling programs, for an Order mandating the restoration of those programs to the sized, status, participation and funding levels that they enjoyed prior to their unlawful termination, for an Order declaring null and void the Defendants' actions in eliminating such programs, for an Order requiring the Defendants, and particularly Defendants GREENSPAN and HUTCHISON, to cease and desist from racially discriminatory actions in violation of the Fourteenth Amendment to the Constitution of the United States, including the maintenance and effectuation of its policy, custom or practice of racial discrimination in the conduct of their athletic programs, for an Order requir-

ing the Defendants GREENSPAN and HUTCHISON, in their individual capacities, to pay damages, punitive damages, and make whole relief to Plaintiff HARPER and other affected Plaintiffs and class members, for an Order awarding Plaintiffs their attorneys fees and costs, and for such other and further relief as may be equitable and just. [Emphasis added]

Because it is somewhat unclear what relief is sought from which defendants, and because some of the §1983 claims are clearly barred by the Eleventh Amendment, I recommend that the motion to dismiss Counts II, III, V and X be granted and that plaintiffs be allowed to replead in a manner consistent with current Eleventh Amendment jurisprudence, namely eliminating all §1983 claims against the entities and clarifying the identity and capacity of the individual defendants from whom prospective injunctive relief and monetary damages are sought.

4. The Eleventh Amendment and state law claims (Counts VIII and IX)

The claims asserted in these two counts hinge on state tort law and the Illinois Constitution's Equal Protection Clause. In *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Supreme Court held that the Eleventh Amendment prohibits state law claims against the States brought in federal court under pendent jurisdiction and further does not permit injunctions requiring State officials to conform their conduct to state law. These two holdings apply directly to the claims raised in these two counts.

As a result, I believe that the defendants -- all of them -- are protected by the Eleventh Amendment and that plaintiffs cannot proceed on their state law claims in federal court as a matter of law. Rather, as defendants argue, the state law claims must be filed in the Illinois Court of Claims. See, *Benning v. Bd. of Regents*, 928 F.2d 775 (7th Cir. 1991), (holding that tort claims against the state must, under state law, be brought in state court). I therefore recommend that Counts VIII and IX be dismissed without prejudice to plaintiffs' right to refile these actions in an appropriate state court for determination.

B. The Sea Clammers Doctrine (Counts II, III, V and X)

In *Middlesex County Sewerage Auth. v. Nat'l. Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981), the Supreme Court held that "when the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Section 1983." Defendants argue that the sexual harassment and discrimination claims asserted under Title IX and Title VI contain sufficiently comprehensive remedies such that the doctrine should be applied to bar the §1983 claims. *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996). *Accord*, *Pfeiffer v. Sch. Bd. for Marion County Area*, 917 F.2d 779, 789 (3d Cir. 1990); *Bouger v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D.Pa.) *aff'd. on other grounds* 882 F.2d 84 (3d Cir. 1989); *Mabrey v. State Bd. for Community Colleges*, 597 F.Supp. 1235, 1239 (D.Col. 1984), *aff'd. on other grounds*, 813 F.2d 311 (10th Cir. 1987); *Mennone v. Gordon*, 889 F.Supp. 53, 59 (D.C.Conn. 1995). *See also*, *Williams v. Sch.Dist. of Bethlehem*, 998 F.2d 1168, 176 (3d Cir. 1993) *cert. de-*

nied, __U.S.__, 114 S.Ct. 689 (1994)(applying doctrine to Title VI). *But see*, *Lillard v. Shelby County Board of Educ.*, 76 F.3d 716 (6th Cir. 1996)(holding that Title IX did not supplant Substantive Due Process claim under § 1983).

In *Waid*, the Seventh Circuit agreed with the Third Circuit, holding that both § 1983 and Title IX prohibit the same kinds of conduct and provide for the same types of remedies. By establishing a scheme of enforcement that includes the "full panoply of judicial remedies," 91 F.3d at 862, Congress demonstrated its intent to place the burden of compliance on the educational institutions[2] themselves, thereby superseding causes of action under § 1983. *Id.*

In my opinion, the Seventh Circuit was clear and expansive in its holding in *Waid*. I believe that this court is bound by that holding and should on that basis alone hold that the § 1983 claims are merged into the statutory claims, and Counts II, III and V should therefore be dismissed. Count X, which is based on the First Amendment, is not affected by this argument.

D. TITLE IX (COUNT I)

Title IX of the Education Amendments of 1972, 20 U.S.C.§1681(a), prohibits discrimination, exclusion from

---

[2] Plaintiffs also point to inequities they believe will result if the doctrine is applied to a case in which the educational institution may be able to claim Eleventh Amendment immunity. But whether a federal statute is "equitable" in the relief afforded is not an issue properly before the court; that is instead an issue for the legislature. It is not a basis for rejecting the clear holding in *Waid*.

participation, or denial of benefits on the basis of sex in any educational program or activity receiving federal funds. Plaintiffs allege that ISU, which receives federal funds, violated the statute by eliminating the two men's sports program in order to achieve "gender equity."

The Department of Health, Education and Welfare is authorized by statute to and in fact has promulgated rules and regulations; some of these rules are further explained by "policy interpretations."

In one of those regulations, 34 C.F.R. 106.41, the Department has dealt with college athletics, requiring that "equal opportunities" be made available for members of both sexes. To determine if such opportunity exists, ten factors are listed for consideration, one of which is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.*

To further explain this particular factor, a Policy Interpretation was issued by the Department that described three major areas of compliance that will demonstrate "effective accommodation" or lack thereof; an institution may select any one of these three areas--called "safe harbors"--to demonstrate compliance with Title IX. One of those "safe harbors" is achieved if participation opportunities for male and female students are provided in numbers "substantially proportionate" to their respective enrollments. 44 F.Reg. 71,418 (1979).

In 1993, the ISU Gender Equity Review Committee tendered a report that is attached to plaintiffs' complaint. The report focused on the "substantial proportionality" aspect of the policy interpretation and pointed out that ISU

had not made any effort to expand opportunities for women or to show that interests of women students had been accommodated. The report noted two decisions from U.S. Courts of Appeals, *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), and *Roberts v. Colorado St. Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993), each of which discussed proportionality and Title IX compliance.

Defendants argue that the University's reliance on the policy interpretation and the two cases provide it with a "safe harbor" from liability for sex discrimination that might otherwise be a technical violation of Title IX, because at the time of the report and the decision to eliminate the men's sports programs, ISU had not achieved proportionality; under the "safe harbor" provision, attempts to bring programs into compliance with Title IX standards are not violations of the statute. According to defendants, this case is factually similar to *Kelly v. Bd. of Trustees. Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, -U.S.-, 115 S.Ct. 938 (1995), in which the court affirmed Judge McDade's grant of summary judgment to the University of Illinois in a Title IX challenge to the University's elimination of the men's but not the women's swimming program. The District Court had found that, although budgetary considerations had played a primary role in the University's decision, compliance with Title IX and the "gender equity" policy of the Big Ten conference had also influenced the change, and that, even if these latter motivations had been the sole reason for eliminating the men's program, "the failure to cut women's programs would still be countenanced by Title IX." 832 F.Supp. 237, 241 (C.D.Il. 1993). In reaching this conclusion, the District Court noted the deference that courts are to accord to regulations and interpretations promulgated under the statute. *Id.* at 242.

In describing the "safe harbor" policy interpretation as "an effort to encourage self-policing," 35 F.3d at 268, the Seventh Circuit accorded the same "considerable deference" to the policy interpretation, *id.* at 270, found that it was not manifestly contrary to the statute, *id.*, and applied it to the facts in the same way the defendants urge here.

The Seventh Circuit's opinion in *Kelly* eviscerates plaintiffs' argument[3] that the policy interpretation cannot be squared with the statute if it is applied to the facts in this case. The policy interpretation makes it possible for institutions to "self police" to achieve statutory goals; without the safe harbors, statutorily-permissible goals, such as those articulated in Title IX and in the University's Gender Equity Report, often could not be implemented.

Finally, I do not believe that there is individual liability under Title IX. The remedies envisioned by the Supreme Court in implying a private right of action under Title IX involved remedies that could be implemented only by the institutions themselves. *See, Cannon v. Univ. of Chicago*, 441 U.S. 667 (1979). Whether the University met the requirements of the "safe harbor" is a fact deter-

---

[3] Plaintiffs also argue that the policy interpretation is not valid because it has not ever been submitted to or approved by the President, a requirement of §1682 of Title IX. But that section of the statute requires each "rule, regulation, or order" to be approved by the President. The "policy interpretation" is an interpretation of a regulation, namely 34 C.F.R. §106.41. *See, Kelley*, 35 F.3d at 270. "Policy interpretations" are not the same as rules, regulations and orders, and therefore are not subject to the procedural requirements of § 1682. So long as they are reasonable interpretations -- and the Seventh Circuit in *Kelley* did not find otherwise -- they should be applied with the deference indicated above.

mination that should not be determined at this stage, and plaintiff should have the opportunity to replead the Title IX claim. I therefore recommend that Count I be dismissed with leave to replead against the University and Board of Regents only.

E. Deprivation of Due Process (Count III)

In light of the above recommendation that the § 1983 claims be dismissed and replead because of sovereign immunity[4], it is perhaps not necessary to consider the substantive claims raised by defendants. However, in light of the rather significant issue raised, I will briefly discuss my thoughts on those arguments.

Defendants assert that the §1983 claims for due process violations fail to state either a property or a liberty interest, as the constitution affords no protection to -- indeed, no recognition of -- a "right" to participate in college athletic programs. To the extent that Count III asserts that the Constitution requires certain procedures before affecting athletic participation, I agree with defendants for two reasons. First, no U.S. Court of Appeals has ever accepted the premise that student athletes have either a property or a liberty interest in participation in sports programs, *See Hamilton v. Secondary School Athletic*

---

[4] Defendants also point out that the §1983 claims in Counts II and III purport to include individual capacity claims against the former members of the now-defunct Board of Regents. Yet the only relief sought is injunctive in nature. I believe such relief would clearly be improper. This is yet another example of the problems with the "generic" pleadings against "defendants" in a suit like this with many defendants. To the extent plaintiffs may be given leave to replead this complaint, I strongly recommend more specific identification of the defendants from whom plaintiffs seek relief.

Ass'n, 552 F.2d 681 (6th Cir. 1976); *Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970); *Rutledge v. Arizona Bd. of Regents*, 550 F.2d 1345 (9th Cir. 1981), *aff'd. on other grounds*, 460 U.S. 719; *accord Hawkins v. NCAA*, 652 F.Supp. 602 (C.D.Ill. 1987); and the Illinois courts that have considered the issue have held that the State has not created such an interest either. *See*, *Proulx v. IHSA*, 125 Ill.App.3d 781, 466 N.E.2d 520 (4th Dist. 1984); *Clements v. Bd. of Educ.*, 133 Ill.App.3d 531, 470 N.E.2d 1209 (4th Dist. 1985).

Similarly, the plaintiffs argument that certain State statutes and University documents created property rights because certain procedures are mandated is to no avail. No liberty interest is implicated by state procedures, and one has no property interest in procedures. *Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992). Moreover, violation of State law is not a violation of the constitution. *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993).

Thus, in addition to the bar of sovereign immunity, Count III fails to state a cause of action for deprivation of any constitutionally cognizable liberty or property interest and should be dismissed for that reason.

F. Racial Discrimination (Counts IV and V)

Count IV asserts a claim for violation of Title VI and Count V of the Equal Protection Clause; both claims are founded upon allegations of race discrimination by defendants. In addition to the Eleventh Amendment issues and the Sea Clammers doctrine discussed above, defendants argue that neither count states a claim.

Plaintiffs' theory is that elimination of the wrestling and soccer programs had a disproportionate impact on black male athletes. Claims for racial discrimination under Title VI and the Equal Protection Clause require allegations and ultimately proof of intentional discrimination by defendants. *Washington v. Davis*, 426 U.S. 229 (1976). This complaint contains allegations of racial discrimination in student housing, the women's basketball team, and condonation of racial slurs and deprecations, as well as racially discriminatory motivation in eliminating the two men's teams.

Defendant argues that the complaint totally lacks any indication of how these allegedly discriminatory conditions affected or altered the decision to eliminate the two men's sports teams. However, these alleged conditions may be circumstantially related to a theory of a discriminatory institution as a whole. *See*, e.g. *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256 (1979)(discriminatory intent adequately plead if alleged that defendants knew of the racial impact and intended those consequences); *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970)(discriminatory intent may be inferred from community racial hostility). I therefore cannot say that there is no set of circumstances which plaintiffs might prove that would entitle them to relief I therefore believe this aspect of the motion should be denied.

Similarly, plaintiffs have attached to the complaint a listing of statistical participation by race in various sports programs at the University. Defendants argue that these very statistics show that minority participation in the two eliminated programs was significantly less that the overall participation in sports and that therefore no disparate racial impact has been alleged under either the Equal

Protection Clause or Title VI. I am most uncomfortable looking at cold statistics and finding that there is only one way -- defendants' way -- of interpreting those numbers. In fact, as plaintiffs' response shows, there are at least two ways of interpreting these numbers, and one of those interpretations supports plaintiffs' theory. Thus, I recommend that the part of the motion based on this argument be denied.

G. Qualified Immunity (Counts II, III AND V)

Defendants also argue that the individual defendants in their individual capacities are entitled to a finding of qualified immunity because there was no clearly established law suggesting that elimination of men's sports programs to achieve gender equity was a violation of Title IX and the Constitution, while plaintiffs argue that the course of action was a facial violation of the statute and inconsistent with the two cases on which the University's decision was purportedly based.

Qualified immunity is an affirmative defense, affording immunity to government officials performing discretionary functions, so long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order for a plaintiff to survive a qualified immunity argument, an examination of law existing at the time of the conduct must reveal that there was "clearly established law" that prohibited the very conduct -- or very similar conduct under factually analogous circumstances -- of which plaintiff complains. In the absence of such clearly established law, individual defendants are immune from liability. *Anderson v. Creighton*, 483 U.S. 635, 641-2 (1987). If

there was such law, then the court must determine whether an objectively reasonable person could have believed his actions were lawful in light of that law and the facts before the person at the time the conduct occurred. *Id.*

The complaint alleges discrimination on the basis of sex which has implications in the Fourteenth Amendment. Plaintiffs assert that the very language of Title IX, 20 U.S.C.1681, as well as two cases, *Cohen* and *Roberts*, *supra*, provide the clearly established law.

The statutory language is not enough on its own. As we have seen in this case, there is and has been for some time a hot dispute about the meaning of §1681 and how to implement it. The language itself does not provide sufficient guidance, so the court must look to the case law, and in so doing, the only conclusion can be that, at the time the University made its decision, there was no case law finding that attempts to comply with Title IX were sufficient to create liability for reverse discrimination. To the contrary, and despite plaintiffs' creative interpretations of *Cohen* and *Roberts*, case law seems to point in precisely the direction taken by the University.

For example, in both cases, the courts noted that a university could bring itself into compliance with Title IX by reducing the opportunities for the "over represented gender" while keeping opportunities stable, or reducing them to a lesser extent, for the "under represented gender." *Roberts*, 998 F.2d at 830 n.9; *Cohen*, 991 F.2d at 898-99 n.15.

In the absence of any reverse sex discrimination case law finding that efforts to comply with Title IX violate either Title IX or the Constitution, I recommend find-

ing that there was no clearly established law and that the individual defendants in their individual capacity are therefore immune from liability under §1983.

H. Conspiracy (Count VI)

In this count, plaintiffs allege that defendants Greenspan, Wallace, Hutcheson and Herman conspired to deprive plaintiffs of equal protection and due process in violation of 42 U.S.C. § 1985. Defendant points out that § 1985 does not prohibit conspiracies to violate due process.

By its very language, §1985 in relevant part prohibits only conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws..." It does not extend to conspiracies to deny due process. *See, e.g., Parker v. Chicago Housing Auth.*, 730 F.Supp. 115 (N.D.Ill. 1989); *Bedford v. Southeastern Penn. Transp. Auth.*, 867 F.Supp. 288 (E.D.Pa. 1994); *Dunn v. New Jersey Transit Corp.*, 681 F.Supp. 246 (D.N.J. 1987). If there is an actual deprivation of due process, then there is a claim under § 1983. But a conspiracy to deny due process is not actionable under § 1985 as a matter of law. *Jennings v. Nester*, 217 F.2d 153 (7th Cir. 1955), *cert. denied*, 349 U.S. 958. The defendants' motion should be allowed as to this argument.

Defendants also raise the intra-corporate conspiracy doctrine as a bar to this claim. Under this doctrine, employees of a single corporation cannot conspire with each other, for the corporation can only act through its employees and agents and cannot conspire against itself. The doctrine applies to governmental agencies. *Wright v. Ill. Dept of Children & Family Svcs.*, 40 F.3d 1492, 1507-9

(7th Cir. 1994). The doctrine does not apply universally; if the entity's employees and agents were motivated solely by personal bias or if egregious circumstances existed, then the doctrine is not applied. *Id.*; *Hartman v. Bd. of Trustees*, 4 F.3d 46 (7th Cir. 1993).

Here, the four alleged conspirators were University employees who, according to the complaint, led the way to the decision to eliminate the men's programs and did so knowing and with the intent that the elimination of the programs would reduce minority participation. The extent of their knowledge and the actions they took are factual issues not appropriately decided by Rule 12 motion, so this aspect of the motion should be denied.

I. Sexual Harassment/ Assault (Count VII)

In this count, plaintiff alleges that defendant Bodner inflicted unwelcome sexual conduct on Harper and others and that defendant Herman made comments of a sexual nature, and that Harper's personal security was threatened with an "officially sanctioned assault." All of this is alleged to have occurred with the knowledge and consent of defendant Hutchison who declined to take any action. This conduct is alleged to have violated Title IX.

Defendants argue that the facts underlying these allegations can be discerned from previous complaints and that those facts, when placed in context of this complaint, fail to state a claim because plaintiff suffered no injury as a result, and without an injury no constitutionally-cognizable claim exists. From somewhere, perhaps one of those earlier complaints, defendants believe that Harper is attempting to state a claim under §1983; however, in this complaint, count VII is only raised under Title IX. There-

fore, the purported lack of constitutional injury is irrelevant.

As to the Title IX claim asserted in this count, defendants argue that the conduct alleged does not meet the objective two-part test, namely that the alleged conduct would affect a reasonable person's ability to function properly in the environment and actually did affect the plaintiff's ability to so function. *See*, *Ward v. John Hopkins Univ.*, 861 F.Supp. 1288, 1290-92 (D.Md. 1994)(Title IX sexual harassment claims to be analyzed using Title VII); and *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989)(setting forth two-part test under Title VII).

Once again, defendants base this argument on specific detailed facts pleaded in a prior complaint and omitted in this one. But that prior complaint is not now before the court[5]. The allegations in this complaint are sufficient to plead a Title IX violation and the motion on this issue must be denied.

J. Illinois constitutional claims (count VIII)

Plaintiffs here allege a violation of the Equal Protection Clause of the Illinois Constitution, namely that the male athletes were deprived of rights and opportunities based on their gender. Defendants argue that this claim is

---

[5] I further note that defendants selectively recall the facts pleaded in prior complaints, mentioning them once and then ignoring them later as best suits their particular argument. For example, the "facts" argued in defendants' §1983 argument are totally ignored in their Title IX argument; if I were to take notice of the previously pled facts, I would rule in the same way: the complaint is adequate to survive a motion to dismiss.

an impermissible collateral attack on a federal statute (Title IX), for if defendants' conduct was an attempt to comply with this federal statute, the fact that the conduct may have been unconstitutional under the Illinois Constitution is legally without meaning; because of the federal Constitution's Supremacy Clause the State's Constitution is preempted by the statute. Defendants further argue that the alleged conduct did not offend the State's constitution.

Defendants' first argument resolves itself: it is based on the supposition that defendants' conduct was in fact an attempt to comply, a hotly disputed issue in this case. The motion cannot be granted on this basis at this time.

As to whether the conduct violated the state's constitution, I have already recommended that the federal Equal Protection claim survive this motion. As the State's Constitution may provide more but not less protection than does the federal constitution, I recommend that the motion also be denied on this basis.

K. State Common Law Claims (Count IX)

The complaint alleges that defendants ISU, the Board of Regents, and Wallace, Greenspan, Herman and Taylor committed torts by eliminating the two men's programs, specifically the torts of promissory estoppel, fraudulent inducement, negligent misrepresentation and intentional infliction of emotional distress. Defendants argue that the complaint fails to state a claim for any of these torts. Although I previously recommended dismissal of these claims on the basis of the Eleventh Amendment, I will briefly address these issues.

1. Promissory Estoppel

The elements of this claim are that defendants 1) made an unambiguous promise, 2) upon which plaintiffs would reasonably and foreseeably rely, 3) and upon which they did rely, 4) with damages resulting from the reliance. *Quake Constr. Co. v. American Airlines, Inc.*, 141 Ill.2d 281, 565 N.E.2d 990 (1990); *Straka v. Francis*, 867 F.Supp. 767 (N.D.Ill. 1994). Plaintiffs allege eligibility for scholarships in programs that ISU unambiguously promised would remain for the duration of eligibility; their decision to attend ISU was made in reasonable reliance on this promise and resulted in loss of opportunity at other schools where plaintiffs could have competed and obtained scholarships.

Defendants respond that the promise of scholarships is analogous to the promise of a gift, which may not, under Illinois law, be enforced under the theory of promissory estoppel, relying on *Hughes v. Encyclopedia Britannica, Inc.*, 1 Ill.App.2d 514, 117 N.E.2d 880 (1st Dist. 1954). Plaintiffs rebut this contention, arguing that athletic scholarships constitute contracts, not gifts, and may be enforced as contracts, thereby making an agreement to provide a scholarship an enforceable and unambiguous promise.

To the extent that this count is asserted on behalf of the men in the class certified by Judge McDade, the motion must be denied, for that class contains present members of the two eliminated teams. For those plaintiffs, this claim survives. However, it cannot survive as to those members of the class who were prospective students eligible for scholarship but not yet parties to any commitment from ISU to provide scholarships or acceptance by the

student of such an offer. Logically, those students had at best received an offer which was withdrawn before acceptance; such an offer simply cannot be an unambiguous promise, nor can reliance thereon be deemed reasonable.

The claim appears to include students who were being recruited by ISU. I believe the claim would have to be replead in order to clarify the plaintiffs in the class who are eligible to make the claim at all. In light of the Eleventh Amendment bar, however, repleading would be futile.

2. Fraudulent inducement

Here plaintiffs allege that, despite knowledge the two programs were in jeopardy, defendants continued to recruit and make promises of scholarships to prospective students, thereby inducing them to come to the university. To plead this claim, a complaint must plead 1) a false statement of material fact intentionally made, 2) to a party who had a right to rely on and did in fact rely on the statement, 3) made for the purpose of inducing the party to act, 4) with injury resulting from the reliance. *Dawson v. W & H Voortman, Ltd.*, 853 F.Supp.1038 (N.D.Ill. 1994).

Defendants argue that the complaint fails to meet the requirement of Rule 8 that pleading fraud requires specific fact pleading, including dates, times, and places. The "shot gun" approach taken by plaintiffs is not sufficient, according to defendants, because the facts as to each plaintiff are not included. Defendants also argue that the alleged misrepresentation relates to promises of future events and merely was silence, not an affirmative misrepresentation; neither of these constitute fraud.

As plaintiffs point out, the alleged misrepresentation was that the sports programs would, at least by implication, remain active during the enrollment/eligibility periods of the class members, despite actual knowledge to the contrary. I find this to be more than mere silence and more than a promise of a future event. It was, if proven, an affirmative representation of the programs' viability that was, again if proven, false at the time it was made. The complaint survives the motion on this ground.

As to the requirements of Rule 9, I confess to certain puzzlement about defendants' argument. Plaintiffs state their understanding that Rule 9 does not require pleading of particular circumstances of each misrepresentation as to each plaintiff[6]. It is my understanding that this claim is asserted for all of the plaintiffs in the class, which would make pleading the exact times, dates and places so difficult that such an action could never be stated for a class that has already satisfied the numerosity requirement as this one has.

Rule 9 is not that demanding. *See, Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975) ("slightly more" detail required to plead notice under Rule 9). This complaint meets that standard by alleging the content of the misrep-

---

[6] Actually, I am somewhat confused as well about the identity of the plaintiffs who assert this claim. In their opposition memorandum, page 40, plaintiffs state that the particular circumstances of each of "thirteen plaintiffs" need not be plead. I find no other reference to *thirteen* plaintiffs, and doubt that this constitutes the entire class; if this claim is raised on behalf of some subgroup of the class, it has certainly not been plead. I believe by inference that this refers to those in the class who were already receiving scholarships from ISU at the time the programs were eliminated. Once again, identification of parties is made difficult or impossible by the generic pleading.

resentation, the general time frame during which it was made, and who made it.

3. Negligent misrepresentation

In order to state this claim, a complaint must include allegations that defendants 1) had a duty to communicate accurate information, 2) breached that duty by making false statements of material fact, 3) were negligent or careless in ascertaining the truth of the statement, and that plaintiff 5) acted in reliance on the statement 6) with resulting damage. *See, August, Bishop & Meier, Inc. v. Premium Link, Ltd.*, 738 F.Supp. 1166, 1169 (N.D.Ill. 1990).

Under Illinois law, the tort is narrowly construed and applies only if the party supplying the information is in the business of furnishing such information and provides the information for the guidance of others in their business relations with others. *See, Gerdes v. John Hancock Mutual Life Ins. Co.*, 712 F.Supp. 692 (N.D.Ill. 1989). A review of state law cases reveals that this tort is limited to such defendants as realtors, appraisers and others whose business is centered upon the provision of information. The defendants in this case do not meet that requirement. I therefore believe that this claim could not stand even without the Eleventh Amendment bar.

4. Intentional Infliction of Emotional Distress

One of the requisite elements of this tort is "extreme and outrageous behavior." *See, Dirksen v. Springfield*, 842 F.Supp. 1117 (C.D.Ill. 1994). Defendants argue that this element is missing entirely from the complaint, because the type of conduct out of which the action arises

could never rise to the level of "beyond all bounds of decency" as required by state courts. *See*, *Dudley Enterprises Inc. v. Davis*, 832 F.Supp. 221, 226 (N.D.Ill. 1993).

I disagree with defendants. At least at this stage of this action, it may be possible for some of the plaintiffs to prove facts sufficiently egregious to meet this standard. I believe this claim is sufficiently plead under state law although it is barred by the Eleventh Amendment.

L. Free Speech (Count X)

Several plaintiffs (those named are Jeffrey Castor, Jr. and Edward Van Duyne) demonstrated against elimination of the two sports programs. The demonstration involved the display of signs (the complaint does not say that the named plaintiffs were carrying the signs). Defendant Jill Hutchison allegedly ripped up one of the signs (which said "ISU is unfair to student athletes.") without the demonstrator's permission and the remaining signs were seized and destroyed by ISU police officers.

Defendant argues that, as there is no *respondeat superior* liability under § 1983 and the complaint lacks any allegation that either Hutchison or the officers were acting in their official capacities, the complaint must be dismissed.

As to Hutchison, the complaint includes an allegation (¶16 is incorporated into this count) that she is a state actor, and therefore the motion fails as to her.

There are no police officer defendants. Despite plaintiffs' protestations to the contrary, the complaint

against ISU for the conduct of these defendants is at present based on nothing more than *respondeat superior*. There are no allegations whatsoever that ISU had a custom or policy of restraining speech or stifling criticism. This claim could not stand as plead.

M. Claims of Rugby Team Members (Count XI)

Both the motion to dismiss this claim and the plaintiffs' response argue logic and inference without legal authority. To the extent that male student athletes have plead a cause of action under Title IX, I believe that logically and inferentially female students should also have the opportunity to develop their case. Because the burden of persuasion is on the moving party and because that burden has not been met, I recommend that the motion be denied.

III. CONCLUSION

I recommend that the Motion to Dismiss Counts IV, VII AND XI be denied. As to the remaining counts, I recommend that Counts I, VI, and X be dismissed with leave to replead; Counts VIII and IX be dismissed without prejudice to filing in state court; and Counts II, III and V be dismissed with prejudice.

ENTER this 12th day of June, 1997.

/s/
ROBERT J. KAUFFMAN
UNITED STATES MAGISTRATE JUDGE